1-21-2016

# Thornton v. Pandrea Respondent's Brief 2 Dckt. 42332

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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| JOHN F. THORNTON,<br><br>Plaintiff-Counterdefendant-Appellant,<br><br>and<br><br>VAL THORNTON,<br><br>Intervenor-Appellant,<br><br>vs.<br><br>MARY E. PANDREA, a single woman individually and as Trustee of the Kari A. Clark and Mary E. Pandrea Revocable Trust, u/a April 9, 2002;<br><br>Defendant-Respondent,<br><br>and<br><br>KENNETH J. BARRETT and DEANNA L. BARRETT, husband and wife,<br><br>Defendants-Counterclaimants-Respondents. | ) | Supreme Court Docket No. 42332-2014<br>Bonner County No. CV2013-1334<br><br>**RESPONDENTS KENNETH J. BARRETT AND DEANNA L. BARRETT'S BRIEF IN RESPONSE TO APPELLANT'S BRIEF AND INTERVENOR'S BRIEF** |

# RESPONDENTS BARRETTS' BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT FOR BONNER COUNTY
HONORABLE JOHN T. MITCHELL, DISTRICT JUDGE PRESIDING


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## I. STATEMENT OF THE CASE

A. Nature of the Case

The Plaintiff, John F. Thornton ("Thornton"), the Appellant herein, brought this case seeking to quiet title to an easement and to a portion of real property jointly owned by the Defendants, Mary E. Pandrea ("Pandrea") and Kari A. Clark ("Clark"), who are sisters. Defendant Clark counterclaimed against Thornton for interference with her easement and for declaratory relief establishing her rights in and to the easement. Prior to entry of judgment in the underlying matter, Pandrea's and Clark's jointly-owned property was partitioned in kind by way of a separate district court matter.

On Clark's Motion for Summary Judgment, the district court entered judgment in Clark's favor on all claims, except Clark's claim for damages, which was reserved for determination at trial. Prior to trial, Thornton and Clark stipulated to dismiss Clark's claim for damages. Thornton and Pandrea also stipulated to dismiss all of Thornton's claims against Defendant Pandrea with prejudice. Pandrea, having brought no cross-claims or counterclaims of her own, was then no longer a party to the action. After all claims were adjudicated, the district court awarded attorney fees against Thornton, and Rule 11 sanctions against Thornton and his attorney, Val Thornton, Intervenor herein. Thornton and his attorney, Intervenor Val Thornton ("Intervenor"), appeal the judgment of the district court in favor of Clark. After entry of said judgment, the Barrets purchased Clark's property and substituted in the stead of Clark in the underlying action and in the instant appeal.

B. Statement of Facts

1. **PARTIES TO THE CASE:** The parties to this case are as follows:

a. **John Thornton ("Thornton")**: the Plaintiff in the underlying action and the Appellant in the instant action;

b. **Val Thornton ("Intervenor")**: Intervenor in the instant action, wife of John Thornton, attorney for John Thornton in the underlying action, and also the instant action;

c. **Mary Pandrea ("Pandrea")**: Defendant in the underlying action, sister of co-defendant Kari A. Clark, aunt of substituted Defendant Deanna Barrett;

d. **Kari A. Clark ("Clark")**: Defendant and Counter-claimant in the underlying action, sister of co-defendant Mary Pandrea, aunt of substituted Defendant Deanna Barrett;

e. **Kenneth J. and Deanna L. Barrett, husband and wife (collectively "Barretts")**: Defendants and prevailing counter claimants substituted in the stead of Clark in the underlying action, Respondents substituted in the stead of Clark in the instant appeal, niece (Deanna) of Clark and Pandrea.

## 2. PROPERTIES AT ISSUE IN THE CASE

Idaho Appellate Rule 35(g) provides that for cases involving real property and easement disputes that an illustrative drawing be provided depicting the layout of the parcels, easements and features. According to the rule, "[t]he parcels, pieces and features depicted shall be labeled so as to adequately identify them. The document shall be based upon testimony or evidence in the record with citations to such supporting evidence." *Id.*

Thornton, in his Appellant's Brief, rather than using the recorded surveys of the properties for illustrative purposes, uses instead "maps" he has *hand-drawn* and which he has misleadingly altered from those found in the record to which he cites[1]. Since the recorded surveys, which are of record, accurately depict the properties and the subject easement at issue in this case, the Respondents cite to those surveys, and, for the Court's benefit, have reproduced them and appended them hereto as Exhibits A and B.

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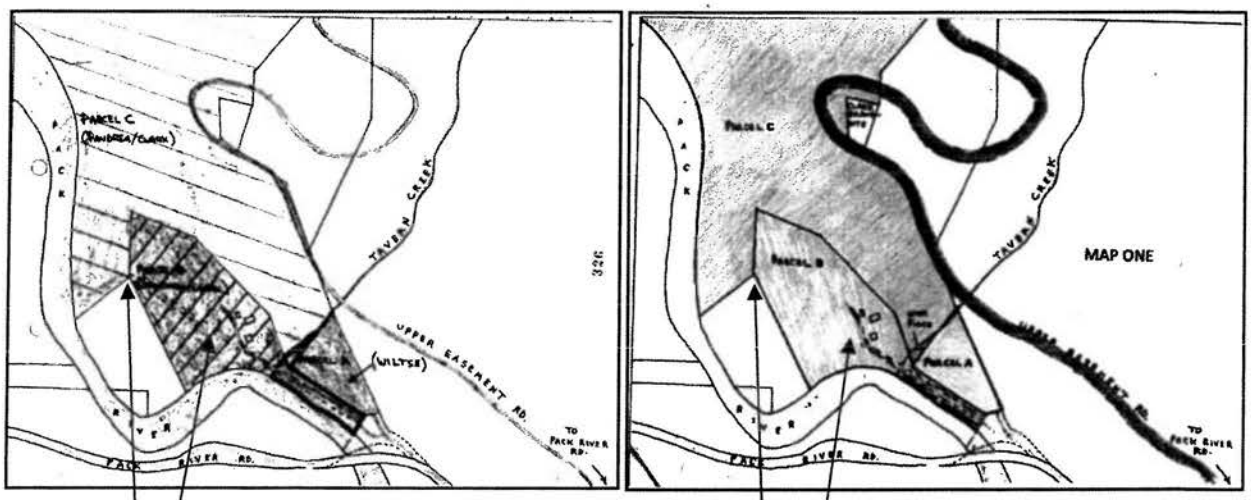
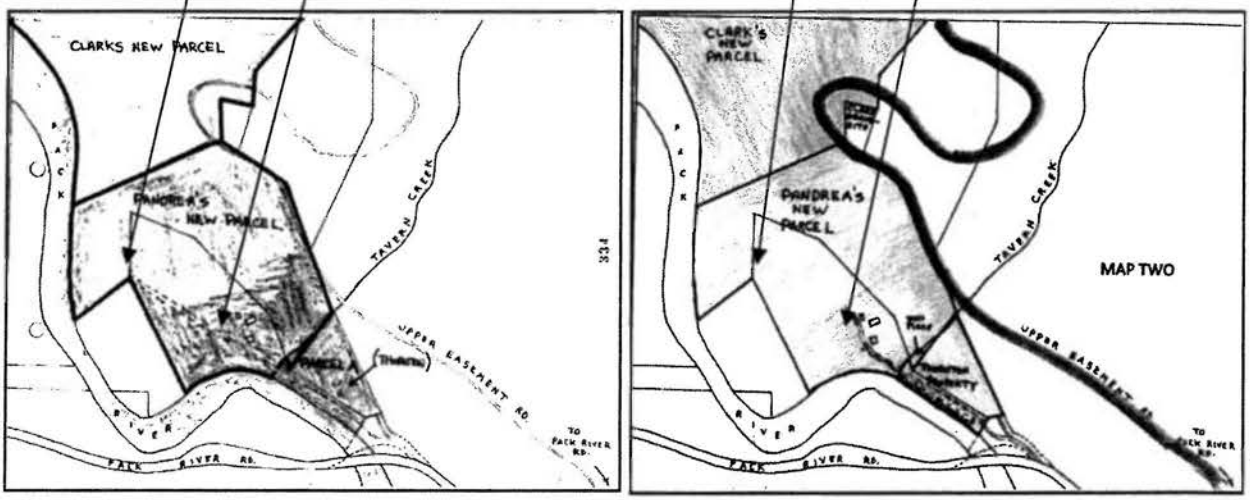
[1]Thornton claims that "[t]wo of Thornton's maps [that Thornton presented to the district court] are appendixed to [his] brief." He asserts that his "Map One" is the same as his hand-drawn map found at R. Vol. II, p. 326 and that his "Map Two" is the same as his hand-drawn map found at R. Vol. II, p. 334. Appellant's Brief, p. 2, L. 2-8. **A comparison of the maps contained in the record at the citations he has provided shows they are not the same**. Thornton has altered the maps from those contained in the record. Significantly, he has removed from the ones appended to his brief **a portion of the easement** – the portion that shows that the easement extends completely across Parcel I until it reaches Parcel II. *See the comparison of Thornton's maps on the following page.*




**R. Vol. II, p. 326** (above), which Thornton claims is the same as **Map One** (above)

A comparison of Thornton's maps found in the record to where he cites (R. Vol. II, p. 326 and p. 334) to his "Map One" and "Map Two" appended to his brief reveals that he has altered his Map One and Map Two in a number of respects from the maps in the record. **His most notable (and misleading) alteration is his removal of the portion of the Clark Estates Easement, which shows that it extends from what he has designated as "Parcel C" (Parcel II) entirely across what he has designated as "Parcel B" (Parcel I).**




**R. Vol. II, p. 334** (above), which Thornton claims is the same as **Map Two** (above)

The Respondents likewise find the Appellant's assigned designations of the properties at issue to be confusing and misleading. They are *confusing* because he refers to them by names

other than those used in the district court matter[2], and because the designations he has assigned to the parcels do not align with their commonly-known and recognizable designations as found in the relevant surveys of the properties. They are *misleading* because at the time when Thornton filed his Complaint, Clark and Pandrea jointly owned two parcels, commonly known as Parcels I and II, but prior to entry of judgment in the underlying case, those two parcels were partitioned into two newly-configured and independently-owned parcels, commonly known as the Pandrea Parcel and the Clark Parcel. Thornton fails to make this distinction.

Now, in his Appellate Brief, Thornton reverts to his post-summary judgment designation of the properties as Parcel A (allegedly the Thornton parcel), Parcel B (allegedly the Pandrea Parcel/ Parcel I), and Parcel C (allegedly the Clark Parcel/Parcel II). "Parcel B" cannot, however, be both the Pandrea Parcel and Parcel I because the Pandrea Parcel is not the same as Parcel I. Likewise, "Parcel C" cannot be both the Clark Parcel and Parcel II because the Clark Parcel is not the same as Parcel II. The Pandrea Parcel and the Clark Parcel are both wholly new and independently-owned parcels created by the district court in the partition action, which divided the entirety of Clark's and Pandrea's jointly-owned 20+ acre property. The boundary lines of the new parcels do not coincide with the original two parcels that made up the jointly-owned property. The whole is the same but the parts are not[3].

The 1979 Clark Survey (reproduced on page 8 below and appended to this brief as Exhibit A) designates the property that had been jointly-owned by Clark and Pandrea *at the*

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[2] In the underlying district court matter, Thornton used various inconsistent designations for the Defendants' parcels, at times referring to them as "Tax Lot 40" and "Tax Lot 49" and at other times as Parcels B and C, as he does in the instant appeal. Thornton recognizes this inconsistency, stating in his Appellant's Brief "[t]hat parcel has been described in various pleadings of the parties as Pandrea's Parcel, Parcel I, Tax Lot 40, and Parcel A herein." Appellant's Brief, p. 13, L. 12-13.

[3] Previously the parts were essentially ¼ (Parcel I) plus ¾ (Parcel II), but the Partition Judgment divided the whole as 9/20 (the Clark Parcel – 10.423 acres) plus 11/20 (the Pandrea Parcel – 12.739 acres). R. Vol. II, p. 440.

*inception of the underlying case* as Parcels I and II. The 2014 Partition Survey (reproduced on page 12 below and appended to this brief as Exhibit B) shows the parties' properties as they were configured *when judgment was entered in the underlying case.* The 2014 Partition Survey identifies the parcels by the names of the owners of the parcels as follows: Pandrea, Clark, and Thornton[4]. For consistency and clarity, the Respondents will refer to the properties in this brief by the designations shown on the surveys of record as follows: Parcel I, Parcel II, Pandrea Parcel, Clark Parcel, and Thornton Parcel.

## THE DOMINANT ESTATE

### Parcels I and II:

a. On August 14, 2013 when Thornton filed his Complaint, Pandrea and Clark jointly owned approximately 20 acres[5] of land to the north of Thornton's property. The land they jointly owned consisted of two parcels: Parcel I and Parcel II of the Harry Clark Estates. R. Vol. I, pp. 128-129, 143. The parcels they jointly owned were parcels created by subdivision in 1979 from a larger parcel of land previously owned by their parents, Harry and Edith Clark. Prior to division, these parcels were part of the family farm where Pandrea and Clark spent their childhood years. R. Vol. I, p. 145. On July 3, 1979 the Survey of the Harry Clark Estates was recorded in Bonner County under Instrument No. 223082 ("1979 Clark Survey"). R. Vol. II, p. 440. The 1979 Clark Survey accurately depicts Parcels I and II, the county road (Pack River Road), and the easement that was created to provide Parcel II and Parcel

[4] The newly-created parcels are the Pandrea Parcel and the Clark Parcel. Thornton was not a party to the Partition Action and, thus, the Thornton Parcel was unchanged by the partition judgment. R. Vol. I, pp. 137-143.

[5] In a separate action in which Pandrea's and Clark's jointly-owned property was partitioned, it was discovered after a survey of the property that it consisted of 23.162 acres, rather than only 20 acres. *Id.*

IX[6] access to the county road ("Clark Estates Easement"). The survey is reproduced on page 8 below with color-coding for easy reference: Parcel I is green, Parcel II is yellow, the Clark Estates Easement is blue, and the county road is pink. A copy of the survey taken from the record is additionally included in the Appendix as Exhibit A. R. Vol. I, p. 143.

i. **Parcel I:** On February 13, 1980, Pandrea purchased Parcel I from the Harry F. and Edith E. Clark Trust by way of Warranty Deed, recorded on May 20, 1980 as Bonner County Instrument No. 226223 ("Parcel I Deed"). R. Vol. II, p. 373. As shown on the 1979 Clark Survey, Parcel I reached the county road and therefore did not require easement access. Parcel I was, however, created *subject to* the Clark Estates Easement. The legal description contained in the Parcel I Deed reads as follows:

> Subject to a 30.0 foot easement for a road right-of-way and utilities, more fully described as follows: A tract of land for a road easement located in Section 11, Township 59 North, Range 2 West, Boise Meridian, Bonner County, Idaho, said road easement being 30.0 feet wide (15.0 feet each side of the centerline) the centerline being more fully described as follows: Commencing at the southeast corner of said Section 11,; thence N.0°58'55"E, along the east line of said section a distance of 1325.42 feet; thence west a distance of 1978.63 feet; thence N. 27°57'08"W, a distance of 448.04 feet to the point of beginning; **thence S. 59°03'17"E, a distance of 637.22 feet; thence S. 58°03'22" E. a distance of 300.0 feet more or less to the easterly right-of-way of the Pack River County Road**.

*Id.* (Emphasis added – bolded words highlight the start and end points of the easement.)

This description matches up from the start and end point of the 30' ROAD EASEMENT shown on the 1979 Clark Survey that begins from the corner where Parcel I intersects with Parcels II and IX, traverses Parcel I, and extends to Pack River Road.

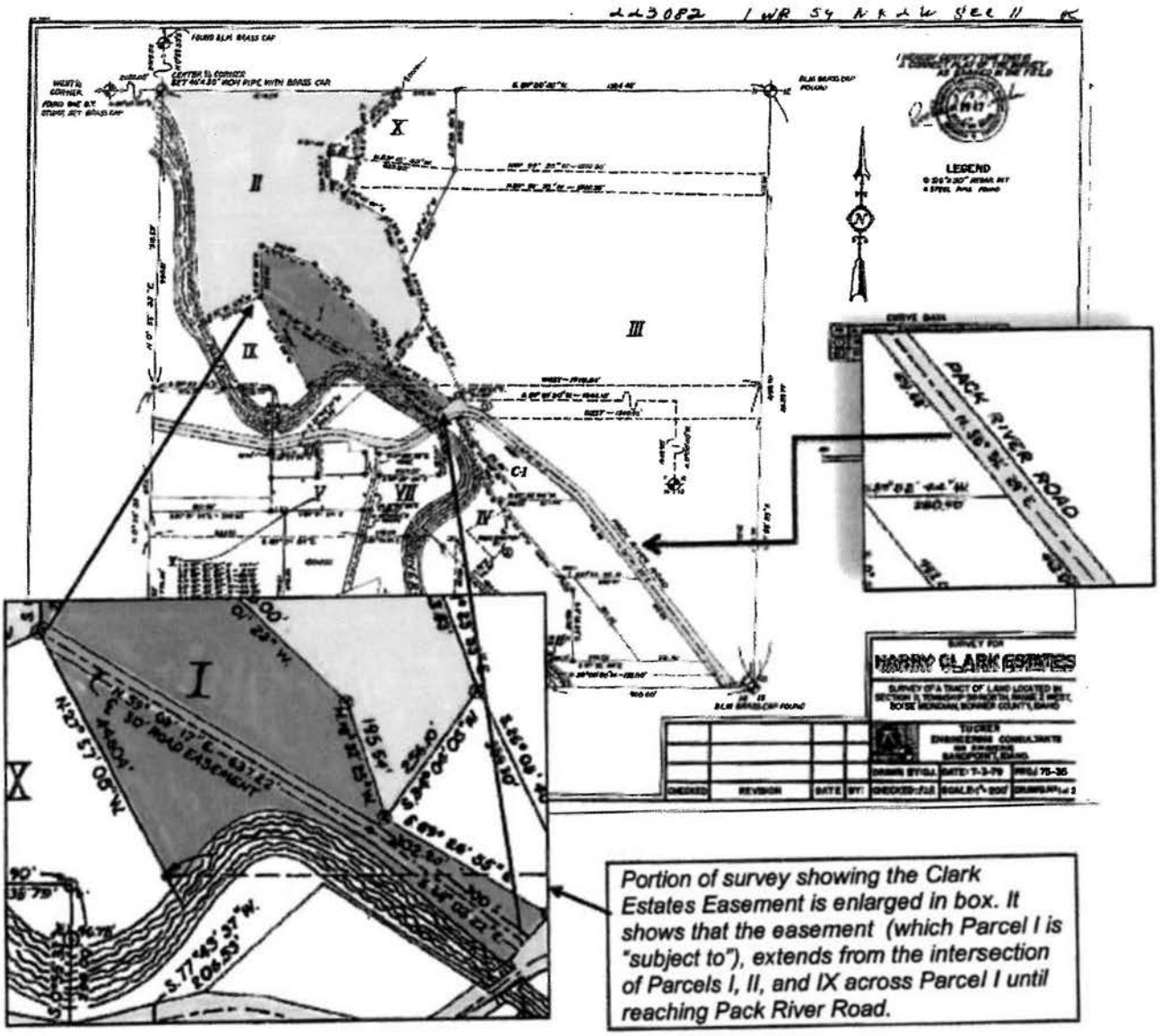
[6] Parcel IX is not owned by any of the parties to this action and was not impacted by the judgment in the underlying case as no claims were brought against the owner of that parcel.

On February 16, 1981, Pandrea quitclaimed an undivided half interest in Parcel I to her sister, Kari Clark. R. Vol. II, p. 375.

ii. **Parcel II:** On August 29, 1991, Clark purchased Parcel II from the Harry F. and Edith E. Clark Trust by way of Warranty Deed, recorded on October 17, 1991 in Bonner County under Instrument No. 396781 ("Parcel II Deed"). R. Vol. II, pp. 377-378. As shown on the 1979 Clark Survey, Parcel II did not extend to the county road so access was provided by way of easement. The legal description of the easement in the Parcel II Deed was as follows: "TOGETHER WITH and subject to a 30.0 foot easement for a road right of way and utilities on existing road as surveyed or to be surveyed." *Id.*

iii. On November 10, 1992, Kari Clark quitclaimed an undivided half interest in Parcel II to her sister, Mary Pandrea[7].

[7] See Document 1 to Appellant's *Motion to Augment* filed with this Court on December 17, 2015 ("*Appellant's Motion to Augment*") – ***Affidavit of Val Thornton in Support of Plaintiff's Motion to Reconsider Summary Judgment*** filed May 6, 2014, Ex. 8.




*Portion of survey showing the Clark Estates Easement is enlarged in box. It shows that the easement (which Parcel I is "subject to"), extends from the intersection of Parcels I, II, and IX across Parcel I until reaching Pack River Road.*

R. Vol. II, p. 440

**THE SERVIENT ESTATE**
**"Thornton Parcel"**

b. On November 10, 1992, Pandrea and Clark conveyed a portion of their jointly-owned property to Pandrea and her then husband, Robert Wiltse ("Wiltse") by way of Quitclaim Deed recorded in Bonner County on December 1, 1992 as Instrument No. 416381 ("Wiltse Deed"). R. Vol. I, pp.128-129. In the Wiltse Deed, they conveyed to Wiltse and Pandrea a small portion of Parcel II (the "Well Piece") and the southerly strip of Parcel I (the "Shoreline Piece"). This conveyance resulted in cutting off Clark's and Pandrea's access to Pack River Road from their property, so they reserved as part of the Wiltse Deed the Clark Estates Easement to allow them continued access. The legal description of the easement that Parcel I was "subject to" in the Parcel I Deed remained the same (from the point where Parcels I, II, and IX intersected to the county road), but the description within the Wiltse Deed stated that the property conveyed to Pandrea and Wiltse was now "Subject to *and reserving* [the Clark Estates Easement]" for the benefit of Clark and Pandrea. *Id.* (Emphasis added.)

On December 23, 1991, Clark, Pandrea, and Wiltse purchased the parcel adjoining the "Shoreline Piece" to its east by way of Warranty Deed recorded on December 30, 1991as Bonner County Instrument No. 399727. R. Vol. II, pp. 380-382. This parcel, together with the Shoreline Piece, became the property commonly known and referred to in this action as the "Thornton Parcel." On October 13, 1992, Clark conveyed her interest in this piece to Pandrea and Wiltse by way of Quitclaim Deed recorded on October 20, 1992 as Bonner County Instrument No. 414162. R. Vol. II, pp. 359, 384-385. Pandrea and Wiltse thereafter divorced, and Pandrea conveyed her interest in the Thornton Parcel to her ex-husband, Wiltse.

On May 4, 1998, Wiltse conveyed the Thornton Parcel to John Thornton and his then wife, Teresa Thornton, by way of Warranty Deed recorded in Bonner County under Instrument

No. 525386 ("Thornton Deed").[8] R. Vol. I, pp. 132-135. The Thornton Deed specifically and expressly described the **Thornton Parcel** as being "Subject to":

> EASEMENT AND CONDITIONS THEREOF RESERVED BY INSTRUMENT
> IN FAVOR OF: MARY E. PANDREA WILTSE, A MARRIED WOMAN DEALING IN HER SOLE AND SEPARATE PROPERTY; AND KARI A. CLARK, A SINGLE WOMAN
> FOR: A 30.0 FOOT EASEMENT FOR A ROAD RIGHT OF WAY AND UTILITIES
> RECORDED: DECEMBER 1, 1992
> INSTRUMENT NO.: 416381

As pointed out in Section I(C)(2)(b) above (page 9), the easement description in the Wiltse Deed (Instrument No. 416381) referenced in the Thornton Deed began at the point where Parcels I, II and IX intersected, then crossed Parcel I, then continued across what is now the Thornton Parcel until reaching the county road. The easement description matches the easement shown on the 1979 Clark Survey.

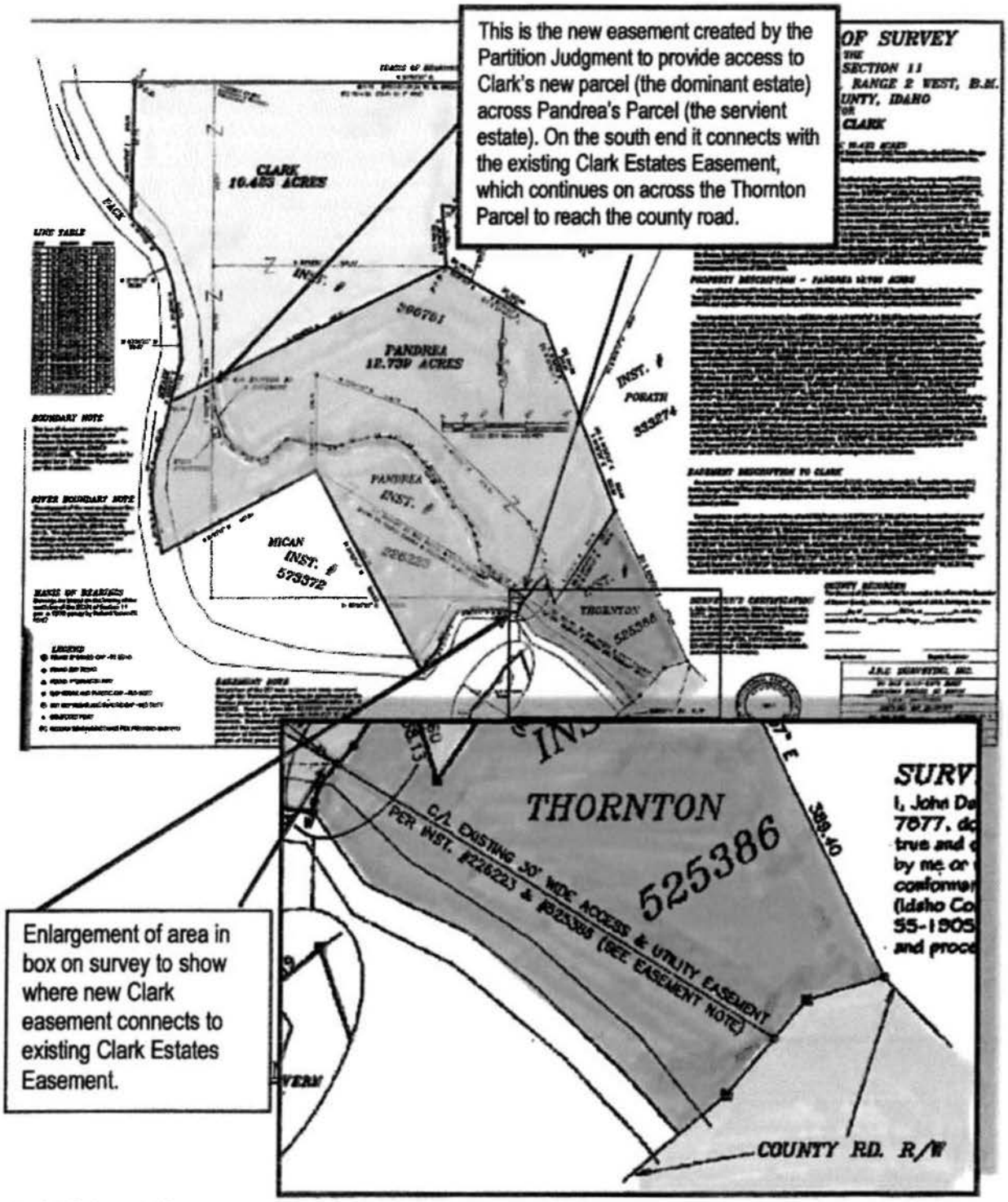
**SEVERANCE OF DOMINANT PARCEL**
**"Clark Parcel" and "Pandrea Parcel"**

c. At the time Thornton filed his Complaint, Clark's and Pandrea's jointly-owned Parcels I and II were the subject of another action wherein Pandrea and Clark had requested the Court partition their property ("Partition Action")[9]. On January 24, 2014, five months after Thornton filed his Complaint, judgment was entered in the Partition Action ("Partition Judgment"). R. Vol. I, pp.137-143. In partitioning the property jointly owned by

[8] John Thornton and Teresa Thornton thereafter divorced and Teresa Thornton conveyed her interest in the Thornton Property to John Thornton.

[9] The Partition Action is Bonner County District Court Case No. CV11-835. That case was brought by Mary Pandrea on May 11, 2011, wherein she requested the Court to partition the approximately 20 acres of property – Parcel I and Parcel II of the Harry Clark Estates – that she and her sister, Kari Clark, jointly owned.

Pandrea and Clark, the district court did not partition it according the boundaries of the Harry Clark Estates' Parcel I (approximately 5 acres) and Parcel II (approximately 15 acres), but created two new parcels from the whole of the approximately 20 acres. Pandrea received 12.739 acres ("Pandrea Parcel") and Clark received 10.423 acres ("Clark Parcel"). Because the boundaries of the parcels had changed, the metes-and-bounds description in the Clark Estates Easement did not reach the newly-created Clark Parcel so the district court created an easement that connects to the existing Clark Estates Easement from the southern end of the Pandrea Parcel and continues north across the Pandrea Parcel, as the servient estate, to the Clark Parcel, as the dominant estate ("Clark Easement"). *Id.* The Clark Easement is described in the Partition Judgment and is shown in Exhibit A to the Partition Judgment, which is a survey of the new Pandrea Parcel and the new Clark Parcel ("Partition Survey"). *Id.*, p. 143. The Partition Survey is reproduced on page 12 below, and a copy of the survey taken from the record is also included in the Appendix as Exhibit B. For easy identification, the Clark Parcel is colored in yellow, the Pandrea Parcel in orange, the Thornton Parcel in green, the easement in blue, and the county road in pink.


This is the new easement created by the Partition Judgment to provide access to Clark's new parcel (the dominant estate) across Pandrea's Parcel (the servient estate). On the south end it connects with the existing Clark Estates Easement, which continues on across the Thornton Parcel to reach the county road.
OF SURVEY
SECTION 11
RANGE 2 WEST, B.M.
UNTY, IDAHO
CLARK
CLARK
10.425 ACRES
PANDREA
12.730 ACRES
INST. #
396761
INST. #
POR. IN
333274
PANDREA
INST. #
226223
MICAN
INST. #
573372
THORNTON
525386
LINE TABLE
BOUNDARY NOTE
RIVER BOUNDARY NOTE
BASIS OF BEARINGS
LEGEND
EASEMENT NOTE
SURVEYOR'S CERTIFICATION
COUNTY RECORDER
J.R.C. SURVEYING, INC.
THORNTON
525386
C/L EXISTING 30' WIDE ACCESS & UTILITY EASEMENT
PER INST. #226223 & #525386 (SEE EASEMENT NOTE)
399.40
COUNTY RD. R/W
Enlargement of area in box on survey to show where new Clark easement connects to existing Clark Estates Easement.

R. Vol. I, p. 143.

## II. ADDITIONAL ISSUES ON APPEAL

1. Whether Respondents Barretts should be awarded attorney fees on appeal.

## III. ARGUMENT

### A. Introduction

In his Appellant's Brief, Thornton raises 11 "Issues on Appeal." Contained within these 11 stated issues he lists an additional 13 sub-issues. After reviewing Thornton's numerous issues, Respondents Barretts find that for simplicity's sake, Thornton's issues can be narrowed down to more effectively address his primary issue, which is the district court's summary judgment finding that Clark (and now her successors in interest, the Barretts) possess an express appurtenant easement across Thornton's Parcel.

From that primary issue, Thornton's other issues emerge. Those issues can be narrowed down as well. Thornton assigns error to the district court's (1) finding that he intentionally interfered with Clark's easement, (2) its award of attorney fees and Rule 11 sanctions, and (3) its substitution of the Barretts in the stead of Clark. Respondents Barretts' Brief is arranged to respond to each of these issues and addresses, where necessary, Thornton's various other superfluous issues which emerge from those main issues.

In the Intervenor's Brief, the Intervenor identifies five issues on appeal, four of which find error with the district court's award of sanctions against the Intervenor, and which arguments mirror the Appellant's arguments on these issues. The Intervenor additionally requests that this Court award I.A.R. 11.2 sanctions against the Barretts.

Respondents Barretts address both the Appellant's and the Intervenor's arguments in their brief.

### B. The district court properly found that Clark possesses an express appurtenant easement across Thornton's Parcel.

Both Appellant and Respondents Barretts agree that by way of the Wiltse Deed that Pandrea and Clark reserved an easement across the land that is now Thornton's. Appellant's

Brief, pp. 3-4. Thornton and the Barretts additionally agree that Pandrea and Clark jointly owned two contiguous parcels – Parcel I and Parcel II[10] – at the time they conveyed the land to Wiltse/Pandrea by way of the Wiltse Deed. *Id.*, p. 13. They further agree that Pandrea and Clark conveyed portions of both Parcel I and Parcel II to Wiltse/Pandrea in the Wiltse Deed. *Id.*, pp. 3, 13. Finally, Thornton and the Barretts agree that the Wiltse Deed does not specifically identify a dominant estate. R. Vol. I, p. 172.

What the parties do not agree upon is the crux of the entire appeal, namely, what is the dominant estate that the Thornton Parcel is subject to? The district court found that the dominant estate included the entirety of the property jointly-owned by Pandrea and Clark at the time they reserved the easement, and it is from this decision that Thornton appeals. In his Appellant's Brief, Thornton contends that the easement was reserved by Pandrea and Clark exclusively to serve their Parcel I. *Id.*, p. 17. Respondents Barretts contend that by the plain language of the Wiltse Deed, Pandrea and Clark made known their intent that the easement would serve the entirety of the dominant estate, which includes both Parcel I and Parcel II. The Barretts therefore respectfully request that this Court confirm the judgment of the district court.

1. The district court properly found that the dominant parcel was the property that Clark and Pandrea jointly owned at the time they reserved the easement.

The district court granted Clark's Motion for Summary Judgment wherein she sought "a determination by the Court that she has an easement appurtenant across the Thornton Property according to the language of Warranty Deed, Bonner County Instrument No. 525386 ['Thornton Deed'] and Quitclaim Deed, Bonner County Instrument No. 416381 ['Wiltse Deed']." R. Vol. II, p. 275.

[10] As Respondents identified in their Statement of Facts, Thornton, in the Appellant's Brief refers to Parcel I (and the wholly new parcel partitioned to Pandrea in 2014) as Parcel B. He refers to Parcel II (and the wholly new parcel partitioned to Clark in 2014) as Parcel C.

*a)* *Summarization of Thornton's arguments that Clark does not possess an appurtenant easement.*

When Thornton filed his Complaint in the underlying action, he asserted that Pandrea had an easement in gross, and also claimed that Clark owned no easement whatsoever. He asserted that "the said dirt driveway was an easement in gross for the benefit of Defendant Mary Pandrea only." R. Vol. I, p. 34, ¶ 2.17. He also asserted that "there is no easement of record describing any dominant parcel of land or suggesting anything other than an easement in gross." *Id.*, ¶ 2.19. In his response to Clark's Motion for Summary Judgment, Thornton abandoned his original position that Pandrea held only an easement in gross and conceded that "the Pandrea parcel is adjacent to his property, and therefore recognizes that the court seems to have determined, in effect, that Mary Pandrea has an easement appurtenant." R. Vol. I, p. 173. With respect to Clark, however, Thornton argued on summary judgment that "whether the easement is appurtenant or in gross, Kari Clark no longer owns Tax Lot 40[11], and therefore no longer owns the easement rights appurtenant to Tax Lot 40." R. Vol. I, p. 172. He argued that "[t]he language upon which Kari Clark relies does not describe a dominant estate and does not pretend to pass on to the heirs and assigns of the grantors." *Id.*

In a continuation of the arguments he made during summary judgment, Thornton asserts now in his Appellant's Brief that Parcel I is the dominant estate to the easement that crosses his property. He claims that "the Quit-Claim Deed [Wiltse Deed] conveyed the respective southeasterly portions of two separate properties [Parcel I and Parcel II], and that the easement was only appurtenant to one of them." Appellant's Brief, p. 13.

*b)* *The reserved easement is appurtenant to the entire dominant estate and is apportionable among subsequent owners after division.*

"An easement appurtenant serves the entire dominant estate and is apportionable among subsequent owners if the dominant estate is divided. . . . Unless limited by the terms or the manner of its creation, the right to use an easement appurtenant extends to each subdivided

[11] In the underlying district court case, Thornton sometimes referred to Parcel I as "Tax Lot 40."

portion of the dominant estate." James Ely Jr. and Jon Bruce, *The Law of Easements & Licenses in Land*, § 9.3; *accord McFadden v. Sein*, 139 Idaho 921, 924 (2004) (general grant or reservation of easement includes right to use easement after subdivision of dominant estate).

As the record demonstrates, in this case, we have not one but three general reservations of easement in the chain of title that create an easement in favor of the Barretts' property, and which burden the Thornton property. These include the Parcel I Deed from 1980 (R. Vol. 2, p. 373), the Wiltse Deed from 1992 (R. Vol. I., pp. 128-129), and the Thornton Deed from 1998. R. Vol. 1, p. 134.

Thornton fails to recognize that the Parcel I Deed conveyed the land that would later become Thornton's property, and expressly reserved through the land that was conveyed "a 30.0 foot easement for a road right-of-way and utilities" which included the reserved easement's metes and bounds description. R. Vol. 2, p. 373. The Wiltse Deed also contained an express general reservation of easement, which parrots the same legal description from the easement created in 1980 by way of the Parcel I Deed. R. Vol. I, pp. 128-129. In the case of the 1980 Parcel I Deed, it benefited the upstream property owned by the grantor, the Harry F. and Edith E. Clark Trust, which would later be divided and eventually conveyed to Clark. The 1992 Wiltse Deed simply re-stated and clarified that the conveyance was "Subject to and reserving a 30.0 foot easement for a road right of way and utilities..." R. Vol. I, pp. 128-129. Therefore, when Thornton came into ownership by way of the 1998 grant from Wiltse to Thornton (the "Thornton Deed"), Thornton's property would have been subject to and burdened by the pre-existing easement even if there was no reservation of the easement. However, the grant to Thornton actually included as part of the legal description the language that it was "Subject to . . . Easement and conditions. . . in favor of: Mary E. Pandrea .. . and Kari A. Clark." R. Vol. 1, p. 134. The easements in the Wiltse Deed to Thornton also expressly referenced Bonner County Instrument No. 416381, which is the 1992 Wiltse Deed. In other words, there are three expressly created easements burdening Thornton's property, and benefitting the Barretts' "upstream"

property. The district court based its decision primarily on the Thornton Deed, but it could just as easily have based its decision entirely on either the Wiltse Deed, or the Parcel I Deed.

*c) The district court applied the correct standards in granting summary judgment in favor of Clark and in denying Thornton's motion to reconsider.*

The district court addressed Thornton's arguments in its decision granting Clark's summary judgment motion. It stated:

> In this case, the Warranty Deed conveying the two acre parcel of land to Thornton contained the following language establishing an easement is as follows:
>
> EASEMENT AND CONDITIONS THEREOF RESERVED BY INSTRUMENT
> IN FAVOR OF: MARY E. PANDREA WILTSE, A MARRIED WOMAN DEALING IN HER SOLE AND SEPARATE PROPERTY; AND KARI A. CLARK, A SINGLE WOMAN
> FOR: A 30.0 FOOT EASEMENT FOR A ROAD RIGHT OF WAY AND UTILITIES
> RECORDED: DECEMBER 1, 1992
> INSURYMENT [*sic*] NO.: 416381
>
> Contrary to the contention of Pandrea and Thornton, the above language does not grant an easement specifically to "Tax Lot 40". Neither Pandrea nor Thornton have submitted any admissible evidence depicting Tax Lot 40 or describing Tax Lot 40 by a metes and bounds description.
>
> ***
>
> **But even if there was admissible evidence describing Tax Lot 40, the *easement* at issue in this case simply does not refer to Tax Lot 40. It grants a thirty-foot easement for a road right of way and utilities to Mary E. Pandrea and Kari Clark for a right of way and use of utilities which serves *their* land, not specifically the land of Tax Lot 40. Both Thornton and Pandrea are very mistaken in their argument linking the easement in favor of Pandrea and Clark to Tax Lot 40. The link simply does not exist.**

R. Vol. II., pp. 279-280. (Italics in original, bold added).

Thornton makes much ado in his Appellant's Brief about the fact that Pandrea's and Clark's jointly-owned property consisted of two parcels – not one. What Thornton does not appear to understand is that the district court's finding that the easement served the entirety of

Clark's and Pandrea's property was not because the court viewed their two contiguous jointly-owned parcels as one, but because as it stated in its decision, "[c]ontrary to the contention of Pandrea and Thornton, the [easement] language [in the Thornton Deed] does not grant an easement specifically to 'Tax Lot 40'." R., Vol. II, p. 280. The district court found that the Thornton Deed "grants a thirty-foot easement for a road right of way and utilities to Mary E. Pandrea and Kari Clark for a right of way and use of utilities which serves *their* land, not specifically the land of Tax Lot 40." R. Vol. II, p. 280. At the time of the grant, the land they owned was of record, and included both Parcels I and II.

The district court acknowledged, as do Thornton and the Barretts, that the Wiltse Deed did not identify a dominant estate, stating:

> [T]here is indisputable evidence that the language provided above created an easement appurtenant. While the language of the easement identifies no dominant or servient estate, it gives a right of access to Pandrea and Clark for a road right of way and for utilities, which serves the land directly as opposed to Pandrea and Clark personally. However, even if the Court finds that there is a doubt whether this language creates an easement appurtenant, the presumption in Idaho rests in favor of finding that an easement appurtenant was created.

R. Vol. II, p. 281. (Emphasis in original).

Despite the fact that the Wiltse Deed did not explicitly identify a dominant estate, Thornton asked the district court to reconsider its decision and restrict the easement in ways the conveyance did not. He continued to insist that the deed provided that the easement solely served Parcel I but rather than relying on the plain language of the deed, he submitted extrinsic evidence in support of his claim.

*d) Because the Wiltse Deed is unambiguous, it was not necessary nor proper to consider extrinsic evidence to determine Pandrea's and Clark's intent, and the district court properly declined to do so.*

Thornton has at no time claimed that the Wiltse Deed was ambiguous and, in fact, in his Appellant's Brief, he states that the language contained in the deed is "unambiguous."

Appellant's Brief, p. 13. Nonetheless, as Thornton explains in his Appellant's Brief, "in support of his motion to reconsider," he submitted the following:

- "his own sworn testimony as to the use of the Easement";
- "the affidavit of Mary Pandrea, attesting to the accuracy of his illustrative maps showing the boundaries and ownership of the properties before and after the 1992 conveyance that reserved the right to the easement";
- "a certified copy of Clark's Answer and Counterclaim filed in the Partition Action, wherein she alleges, under oath, that her fifteen acre parcel remained separate and distinct from Pandrea's five acre parcel";
- "certified copies of survey maps showing the three separate parcels";
- "certified copies of Clark's and Pandrea's deeds to their respective parcels"; and
- "a certified copy of the Quitclaim Deed creating the Easement."

*Id.*, p. 12.

The district court acknowledged that Thornton submitted these documents, but found that they did "nothing to dispute the language of the [Thornton Deed or the Wiltse Deed]." R. Vol. III, p. 538. When a deed is unambiguous, the intention of the parties must be ascertained from the deed itself. In the case of *Currie v. Walkinshaw*, 113 Idaho 586, 746 P. 2d 1045 (Ct. App. 1987), the Idaho Court of Appeals explained:

> In construing a deed the court should seek and, if possible, give effect to the intention of the parties. **If the language of a deed is plain and unambiguous the intention of the parties must be ascertained from the deed, and parol evidence, that is, documentary, oral or real evidence extrinsic to the deed itself, is not admissible to ascertain intent.**

*Id.* at 1048. (Citations omitted) (Emphasis added).

***i. The Wiltse Deed makes clear what Clark and Pandrea's intentions were when they reserved the easement.***

In *Quinn v. Stone*, 75 Idaho 243, 270 P. 2d 825 (Idaho 1954), the *Quinn* court explained the general rule regarding interpreting an easement, stating that "'[i]n describing an easement, all that is required is a description which identifies the land which is the subject of the easement, and expresses the intention of the parties.'" *Id.* at 826-827. In our case, the Thornton Deed

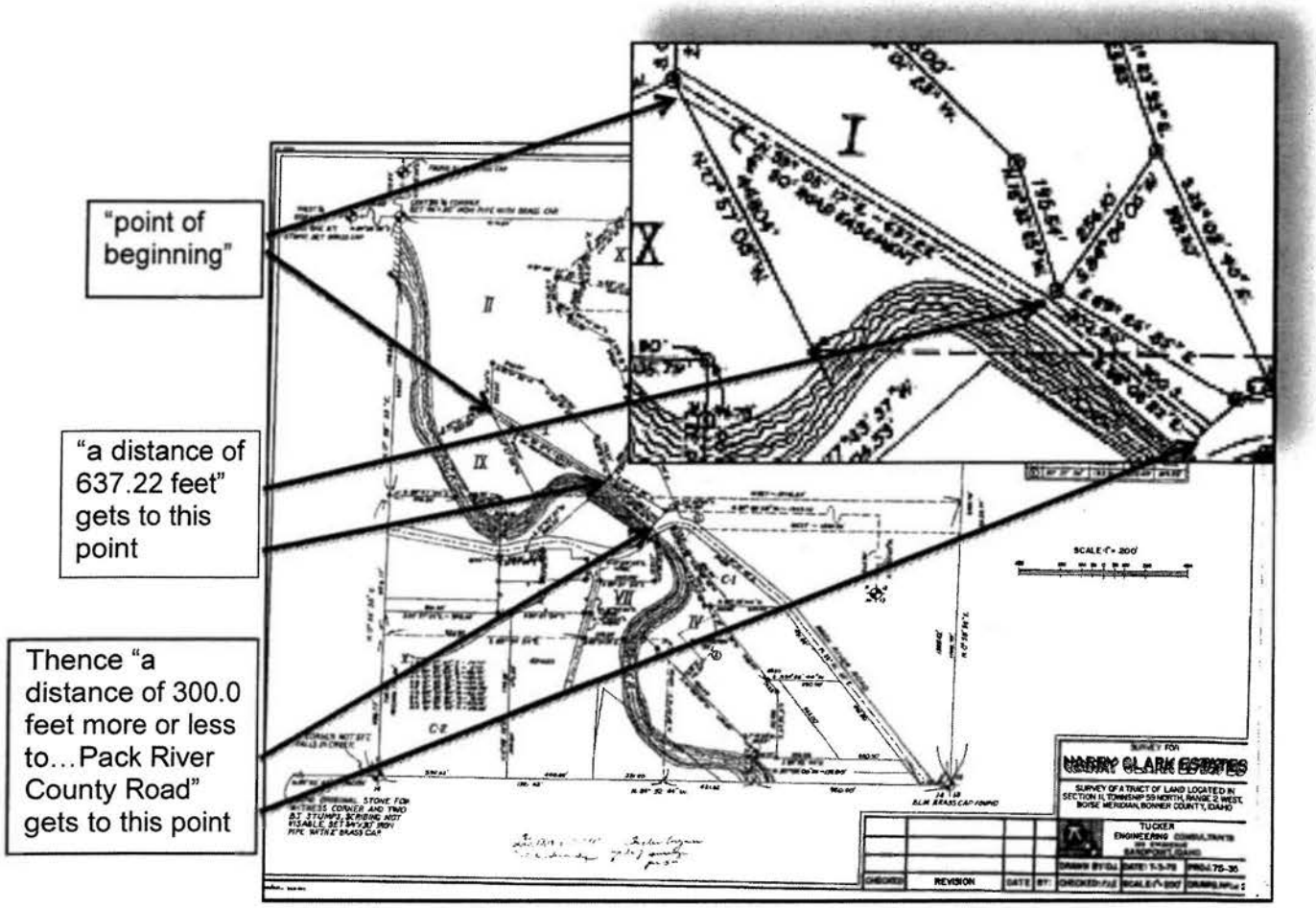
identifies the land which is the subject of the easement, that being the Thornton Parcel. Further, the Thornton Deed expresses the intent of the parties, that is that it is "in favor of Pandrea and Clark" for "a 30.0 foot easement for a road right of way and utilities." R. Vol. I, pp. 132-135. The property owned by Pandrea and Clark as of that date was a matter of record and nothing about the grant is ambiguous. The reservation was for "road right of way and utilities" which clearly demonstrates the intent of the parties was that it would serve the individuals' *property*, not the individuals *personally*.

Despite Thornton's contention that the easement was created to solely serve Parcel I, there is no language whatsoever in the Wiltse Deed nor the Thornton Deed to support his assertion. In his brief, Thornton avoids citing to the actual language of the deeds. He states: "Within the property description of the Shoreline Piece is found language reserving 'to the grantors' the right to continue using the driveway." Appellant's Brief, p. 4. The word "driveway" does not show up in the deed. The Wiltse Deed provides an unambiguous description of the *easement* that Pandrea and Clark reserved therein as follows:

> Subject to and reserving a 30.0 foot ***easement*** for a ***road right-of-way*** and ***utilities*, more fully described as follows**:...to the point of beginning; thence S. 59°03'17"E, a distance of 637.22 feet; thence S. 58°03'22" E. a distance of 300.0 feet more or less to the easterly right-of-way of the Pack River County Road.

R. Vol. I, pp. 128-129. (Emphasis added).

This easement description – from the point of beginning until its terminus – matches up *exactly* to the easement shown on the 1979 Clark Survey (reproduced below for the Court's convenience). R. Vol. II, p. 440.




This tells us all we need to know about Pandrea's and Clark's intent. The fact that the easement description begins on Parcel II, and traverses from there across Parcel I, and then traverses the Thornton Parcel makes it clear that Pandrea and Clark intended that it would serve both of these parcels that they jointly owned when they reserved the easement. Thornton was on notice of this because the unambiguous description was contained in the Wiltse Deed, which was referenced in the Thornton Deed. The Idaho Supreme Court makes this clear in *Akers v. D.L. White Construction, Inc.,* 142 Idaho 1178, 127 P.3d 196 (2005).

> "One who purchases land expressly subject to an easement, or with notice, actual or constructive, that it is burdened with an existing easement, takes the land subject to the easement." *Checketts v. Thompson,* 65 Idaho 715, 721, 152 P.2d 585, 587 (1944) . An express easement may be by way of reservation or by exception. 7 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 60.03(a)(2)(i) (David A. Thomas ed., 1994).

*Id.* at 204.

The Wiltse Deed in no way limits the easement solely to "Tax Lot 40" (aka "Parcel B"/aka Parcel I). If Clark and Pandrea intended the easement to solely serve Parcel I, surely they would have explicitly indicated that in the language of the conveyance. But they did not do that. Instead, they specifically included the portion of the easement that extends across Parcel I to reach Parcel II, to wit: "to the point of beginning; thence S. 59°03'17"E, a distance of 637.22 feet." Thus, Thornton's argument that the easement was reserved solely for Parcel I is contrary to the plain language of the deed.

The district court addressed Thornton's refusal to address the language of the deeds and his attempt to instead ask the court to consider irrelevant documents as follows:

> Clark further requests that this Court strike the Affidavits of Pandrea and Thornton in support of the Motion for Reconsideration, as she claims they are irrelevant as to whether Clark has an easement appurtenant to the Thornton Property, the maps hand-drawn by Thornton are without foundation, **and the legal descriptions contacted [*sic*] within deeds speak for themselves**. *Id.*, pp. 3, 4. The Court will not strike Thornton's affidavit. **While Thornton's affidavit provides no relevant evidence to rebut the express easement of record Clark has across Thornton's land, Thornton's affidavit is relevant to show the absurd lengths he is willing to travel to try and trump Clark's easement**. Drawing twelve maps with colored pencils in an attempt to show what happened at various times in history, does nothing to change the fact that Clark has a written express easement across Thornton's land.
>
> In the underlying motion, Clark sought a determination by the Court that she had an easement appurtenant across the Thornton Property according to the language of Warranty Deed, Bonner County Instrument No. 525386, and Quitclaim Deed, Bonner County Instrument No. 416381. [Citations omitted]. **At no time in this litigation, from its inception by Thornton to the current time, does Thornton address the actual language of these documents. When Thornton filed his Complaint to Quiet Title and for Damages, he breathed not a word about Clark's recorded express easement. Throughout summary judgment, Thornton refused to discuss that easement, instead he chose to make irrelevant arguments to the Court. Now, Thornton supplies the Court with additional documents that do nothing to dispute the language of Warranty Deed, Bonner County Instrument No. 525386, and Quitclaim Deed, Bonner County Instrument No. 41638** [*sic*]. The hand-illustrated maps made by John Thornton alleging to depict the properties and easements involved in this case are of no relevance. Clark shifted the burden to Thornton to show that there is a

genuine issue of material fact and Thornton has failed to meet his burden via admissible and relevant evidence.

R. Vol. III, pp. 537-538. (Emphasis added.)

*e) The legal effect of an unambiguous deed must be decided by the trial court as a question of law and summary judgment was, thus, proper in this case.*

Thornton admits the Wiltse Deed is unambiguous yet still insists that this "matter should be submitted to a jury." Appellant's Brief, p. 12. He asserts that it was an abuse of discretion for the district court to determine factual issues on summary judgment when the matter was set for a jury trial. Appellant's Brief, p. 12. Thornton's assertion is erroneous. In *Machado v. Ryan*, 153 Idaho 212, 280 P.3d 715 (2012), this Court verifies that because the Wiltse Deed, which reserved the easement is unambiguous, this matter was properly decided by the trial court as a question of law.

> "The legal effect of an unambiguous written document must be decided by the trial court as a question of law." *Mountainview Landowners*, 139 Idaho at 772, 86 P.3d at 486 (quoting *Latham v. Garner,* 105 Idaho 854, 857, 673 P.2d 1048, 1051 (1983)). "If, however, the instrument of conveyance is ambiguous, interpretation of the instrument is a matter of fact for the trier of fact." *Id.*

*Id.* at 720-721.

The district court explained that "Clark [had] shifted the burden to Thornton to show that there [was] a genuine issue of material fact and Thornton ha[d] failed to meet his burden via admissible and relevant evidence." R. Vol. III, p. 538. This Court has confirmed that:

> Summary judgment must be granted 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c).

*Ida-Therm, LLC v. Bedrock Geothermal, LLC*, 154 Idaho 6, 293 P. 3d 630, 632 (2012).

Thus, the district court correctly found that because there was no genuine issue of material fact, summary judgment was appropriate in this case.

*f)* *Thornton has doctored the record on appeal to mislead this Court as to the fact that the easement was intended to serve Parcel II.*

As Respondents Barretts pointed out in their Statement of Facts (Section I(C)(2), pp. 3-4), Thornton has doctored the exhibits he has appended to his brief (his "Map One" and "Map Two"). In doing so, he has notably removed the portion of the easement discussed in the Wiltse Deed that extends across Parcel I and reaches Parcel II. While the Barretts agree with the district court's finding that "[t]he hand-illustrated maps made by John Thornton alleging to depict the properties and easement involved in this case are of no relevance" (R. Vol. III, p. 538), it is worth pointing out that in the documents Thornton submitted to the district court, which are of record, he had included in his drawings the portion of the easement that crosses Parcel I but has now purposefully removed it. This doctoring of the record on appeal can be viewed as nothing less than an attempt to underhandedly bolster his arguments and mislead this Court[12].

Similarly, in the underlying case, Thornton withheld pertinent information from the district court when he filed his Complaint and attached to it what he alleged was the legal description of the property he owned. The document he attached to his Complaint was not a copy of the Thornton Deed, however. The purported legal description of his property was a document that he had typed up and from which he had notably removed the language which referenced the easement. The part that he removed was the part that stated in all caps the following: "EASEMENT AND CONDITIONS THEREOF RESERVED BY INSTRUMENT...IN FAVOR OF: MARY E. PANDREA...AND KARI A. CLARK...FOR: A 30.0 FOOT EASEMENT FOR A ROAD RIGHT OF WAY AND UTILITIES." R. Vol. I, pp. 38-39.

In its decision denying Thornton's motion to reconsider and granting Clark's request for attorney fees and costs, the district court addressed Thornton's failure to provide evidence of the easement when he filed his Complaint (R. Vol. II, p. 538) and indicated that "Ms. Thornton's

[12] See page 4 in the Statement of Facts, where Respondents compare the documents of record to Thornton's doctored "Map One" and "Map Two" to see a side-by-side comparison of the changes that he made.

decision not to produce a copy of the very deed that this case turns around is – is part of the basis for this Court's awarding Rule 11 sanctions." Tr., p. 81, L. 16-19.

Respondents argue in Section III(G) below that these actions of Thornton in misrepresenting the evidence before this Court, in addition to his ongoing frivolous approach to this litigation, also warrant the award of sanctions on appeal under Idaho Appellate Rule 11.2(a).

### C. The district court properly found that Thornton intentionally interfered with Clark's easement.

In Clark's motion for summary judgment, she provided undisputed evidence that in 2013 Thornton erected a locked gate across the easement road through his property and posted a sign that stated: "NOTICE KARI CLARK is prohibited from entering upon this property for any reason under penalty of criminal trespass. I.C. 18-7011. John F. Thornton, 4685 Upper Pack River Road, Sandpoint, Idaho 83864, Owner." R. Vol. I, pp. 115-116, 146. A photograph of the sign that Thornton placed on his property can be found at R. Vol. I, p. 156.

In her motion for summary judgment, Clark additionally provided undisputed evidence that on July 20, 2013, Clark and her family attempted to access her property through the easement road on Thornton's property but when they reached the gate that Thornton had erected, they were stopped by Thornton and his wife/attorney, Val Thornton, the Intervenor herein. R. Vol. I, p. 146. When Thornton stopped Clark, it was just after a memorial service held for Clark's son had concluded. Clark was headed to her property and further up the mountain to scatter Clark's son's ashes upon the same site where Clark's father is buried. *Id.* Thornton and the Intervenor would not permit Clark and her family members to pass through the gate unless they first signed a document they presented the Clarks with. *Id.* Clark was visibly distraught and did not want to sign the document. However, even though Clark was represented by counsel at the time, Intervenor Val Thornton demanded that she sign or she would not be allowed to access her property and continue with the ash-scattering portion of the service. *Id.* A photograph taken that day showing Thornton and Intervenor forcing Clark to sign the document

can be found in the record at Vol. I, p. 160. The document Thornton and the Intervenor forced Clark to sign can be found at Vol. I, p. 162.

Thornton did not dispute the above-stated facts in his opposition to Clark's motion for summary judgment. Instead, he attempted to defend his actions and deflect blame, as follows:

> John Thornton has a right to question those who claim to have the right to cross his property, and it is not unreasonable to ask for identification and verification of such claims...When he learned that Kari Clark claimed a right to use the easement, he immediately requested to be informed of the basis thereof, and notified Richard Kuck, her attorney in the partition matter (CV-2011-835) that she would be trespassed from the property unless she provided a legal basis for her claim...Thornton further agreed with Richard Kuck to give Kari Clark permissive use of the easement to visit the gravesite on July 20, 2013...Kari Clark's attorney Richard Kuck agreed to write a letter of agreement regarding permission to use the easement on that day, but failed to do so. Instead, Kari Clark appeared at the locked gate, and was permitted to use the easement.

R. Vol. I, pp. 176-177.

The district court addressed Thornton's actions in erecting the locked gate, putting up the threatening sign, and blocking Clark's access that day:

> Thornton claims he was unaware of the easement rights of Clark, yet the Warranty Deed conveying the two acre parcel of land to Thornton contained the following language establishing an easement as follows:
>
> INSTRUMENT
> IN FAVOR OF: MARY E. PANDREA WILTSE, A MARRIED WOMAN DEALING IN HER SOLE AND SEPARATE PROPERTY; AND **KARI A. CLARK**, A SINGLE WOMAN
> FOR: A 30.0 FOOT EASEMENT FOR A ROAD RIGHT OF WAY AND UTILITIES
> RECORDED: DECEMBER 1, 1992
> INSURYMENT [sic] NO.: 416381
>
> Affidavit of Joel P. Hazel, Exhibit B (emphasis added). The Warranty Deed conveying the Thornton Property to Thornton put Thornton on notice that Clark had an easement. In spite of this, Thornton erected a locked gate across the easement road and posted a sign dated July 5, 2013, next to the gate, which read as follows:

NOTICE
KARI CLARK
IS PROHIBITED FROM ENTERING UPON THIS PROPERTY FOR ANY REASON UNDER PENALTY OF CRIMINAL TRESPASS. I.C. § 18-7001.

JOHN F. THORNTON
4685 UPPER PACK RIVER ROAD
SANDPOINT IDAHO 83864
OWNER

***

As mentioned above, Thornton's failure to read and comprehend what is of record (or if he read his deed at the time, his refusal to abide by the language in his deed), the written easement, is troubling to the Court. Nearly a year ago, Thornton's in July 2013 of excluding Clark from using her easement, was simply wrong. Thornton had no legal right to do so. But *today*, Thornton has obviously read his deed. Thornton can no longer claim ignorance. And for Thornton to *today* claim that "John Thornton has a right to question those who claim to have the right to cross his property, and it is not unreasonable to ask for identification and verification of such claim..."...is absolutely incredible...Thornton's attorney also argued at the March 14, 2014, hearing that "A landowner has a right to approach a person that you have never met before." Such argument is disingenuous given the fact that fifteen days before meeting Clark and confronting Clark, Thornton, on July 5, 2013, put up the following sign:

NOTICE
KARI CLARK
IS PROHIBITED FROM ENTERING UPON THIS PROPERTY FOR ANY REASON UNDER PENALTY OF CRIMINAL TRESPASS. I.C. § 18-7001.

***

Why would Thornton place such a sign if he had never met Kari Clark or at least knew who Kari Clark was, and *knew Kari Clark claimed some right to cross his property*?

R. Vol. II, pp. 283-286. (Emphasis in original).

Having found that Thornton had an express appurtenant easement across Thornton's property, it followed that the district court would find (and did find) that "Thornton interfered with that right when he erected a locked gate." R. Vol. II, p. 286.

On appeal, Thornton again attempts to deflect blame and defend his and his attorney's/spouse's actions in wrongfully blocking Clark's access. He claims, "[i]n this case, it is Clark, not Thornton, who is at fault." Appellant's Brief, p. 29. Despite Thornton's excuses, his actions in erecting a locked gate, placing a sign next to it that threatens Clark with criminal

trespass, and not allowing Clark to pass by the gate without signing a document cannot be perceived as anything but intentional. It is exactly this type of forceful self-help that is frowned upon in Idaho. *See, e.g., Weitz v. Green*, 148 Idaho 851, 864 (2010). The same can also be said of attorney Val Thornton's *ex parte* communications with Clark. *See, e.g., Runsvold v. Idaho State Bar*, 129 Idaho 419, 421-22 (1996) (attorney may not communicate with opposing party about the subject of representation); I.R.P.C. 4.2 (same).

Additionally, Thornton's claim that "Clark's allegations concerned one occasion, *occurring after Clark's interest in Parcel B was extinguished by the partition ruling*," is false. *Id.* (Emphasis added). It is false because the sign was posted well before the July 20, 2013 confrontation (the sign was dated "July 5, 2013"). It is also false because Clark still held an undivided interest in Parcel 1 until judgment was entered in the Partition Action on **January 24, 2014**. It was not until this date that Parcels I and II were reconfigured into the Pandrea Parcel and the Clark Parcel. R. Vol. I, pp. 137-143. Thus, even if the district court had adopted Thornton's arguments and not found that Clark had an appurtenant easement after partition of the jointly-owned parcels, Clark's and Pandrea's rights in Parcels I and II were identical on July 20, 2013 and continued to be identical until January 24, 2014. Thornton was wrong on July 20, 2013 and on every day that he prevented Clark from accessing her property due to his locked gate. His actions were undeniably intentional and the district court properly so found.

### D. The district court's award of attorney fees against Thornton under I.C. § 12-121 and Rule 11 sanctions against both Thornton and the Intervenor were proper.

The district court's decision to award attorney fees under Idaho Code 12-121 and impose sanctions under Rule 11 are subject to the abuse of discretion standard of review. *Urrutia v. Harrison*, 156 Idaho 677, 680 (2014); *Bailey v. Sanford*, 139 Idaho 744, 745, 86 P.3d 458, 467 (2004); *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94 (1991). Therefore, the sequence of inquiry is (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and

consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc.* at 94. For the reasons set forth below, Thornton has not shown that the district court abused its discretion and its decision should therefore be upheld.

1. The district court found that Clark was the prevailing party and based on its discretion to do so, properly awarded her attorney fees and costs pursuant to I.C. § 12-121 and I.R.C.P. 54.

Idaho Rule of Civil Procedure 54(e)(1) provides in pertinent part:

> In any civil action the court may award reasonable attorney fees...when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation.

In her motion requesting attorney fees, Clark gave a variety of reasons to support her assertions that "the frivolity and unreasonableness of Thornton's positions throughout this litigation is unquestionable." R. Vol. III, p. 478.

Clark addressed the frivolity of Thornton's changing arguments.

> Thornton's initial position in this litigation was that Pandrea had an easement in gross across Thornton's property, but Clark had no easement rights. **Thornton made this frivolous assertion** despite the fact that the Warranty Deed conveying the property to Thornton specifically stated that he conveyance was subject to "A 30.0 FOOT EASEMENT FOR A ROAD RIGHT OF WAY AND UTILITIES" in favor of "MARY E. PANDREA WILTSE" and "KARI A. CLARK."

*Id.* (Emphasis added).

Clark explained how Thornton abandoned his frivolous "easement in gross" argument and instead unreasonably pursued another position with no factual basis.

> After this Court indicated in its ruling on Pandrea's Motion to Dismiss that both Clark and Pandrea had an appurtenant easement across the Thornton Property based on the clear language of the deeds at issue, Thornton then changed his position and argued that any easement across his property only served "Tax Lot 40." However, like Thornton's other claims in this litigation, there was absolutely **no basis to support such an argument** and his assertions can only be viewed as an attempt to harass Clark and to increase Clark's costs in this case.

*Id.* (Emphasis added).

Clark also pointed out another of Thornton's frivolous arguments, which had no basis in the law.

> In addition, Thornton made the **frivolous claim** that an appurtenant easement must be adjacent to the property burdened. More specifically, Thornton's attorney stated, "the easement, if any, appertaining to the adjacent parcel only appertains to the adjacent parcel" Memorandum Decision, p. 16.

R. Vol. III, p. 479. (Emphasis added).

Clark explained how Thornton's actions were an obvious calculated course of conduct designed to harass Clark and to wear her down.

> **Thornton's willful decision to ignore the plain language in the deeds and to wrongfully interfere with Clark's easement rights goes far beyond mere neglect and constitute a calculated course of conduct designed to harass Clark and wear her down with expenses and wasteful litigation**. Thornton's conduct in interfering with Clark's property rights and the frivolous claims that he brought against Clark in this case are inexcusable. Not only was Thornton's conduct in violating Clark's property rights troubling, but his continued pursuit of his unreasonable claims against Clark without any foundation whatsoever is the very definition of frivolousness. Thornton's deleterious tactics should fail and Clark is entitled to an award of all of her attorney's fees [and] costs pursuant to I.R.C.P. 54(d) and I.C. § 12-121.

R. Vol. III, pp. 479-480. (Emphasis added).

Clark also demonstrated how Thornton and the Intervenor worked in concert with Pandrea to harass Clark.

> The lawsuit that was brought by Thornton and his attorney against Clark goes above and **beyond frivolous and constitutes vexatious litigation**. Throughout the entirety of this case, Thornton and his attorney have purposefully driven up Clark's costs of litigation by completely ignoring the plain language contained in two deeds of record describing Clark's easement rights and by **seemingly working in concert with Pandrea to harass Clark. In addition, Thornton has attempted to utilize affidavits and documents provided by Pandrea in an effort to support Thornton's meritless claims even though Thornton is the Plaintiff and Pandrea is a co-defendant with Clark.**

R. Vol. III, p. 481. (Emphasis added).

At the hearing, the district court articulated its reasons for granting Clark's motion on the record. (Tr., p. 80, L. 8-10). It agreed that Clark's co-defendant, Pandrea, was acting in concert with Thornton, stating, "it's quite obvious that Pandrea and Thornton have been mirroring each other; Pandrea, you know, adopting virtually any argument that was made by Thornton." Tr., p. 82, L. 24-24, p. 83, L. 1-2. The district court further stated that "the fact that Thornton would even bring this case in light of an express recorded easement that wasn't vague, that gave Clark all the right to cross this property it is – as Mr. Hazel quoting of Seinfeld, it's outrageous, it's egregious, it is preposterous. It's just absurd." Tr., p. 83, L. 8-13.

*a)* *The district court properly complied with I.R.C.P. 54(e)(2) by providing this Court a clear understanding of its decision to award fees to Clark.*

While Thornton is correct in his claim that when fees are awarded pursuant to I.C. 12-121, I.R.C.P. 54(e)(2) requires the court to make written findings as to the basis and reasons for awarding such fees, this standard was met.

In the case of *Snipes v. Schalo*, 130 Idaho 890, 950 P. 2d 262 (Ct. App. 1997), the *Snipes* Court explained the purpose of the rule requiring the court to make written findings as to the basis and reasons for awarding fees under I.C. 12-121. It states:

> Idaho Rule of Civil Procedure 54(e)(2) requires the district court, when it awards attorney fees pursuant to I.C. § 12-121, to make written findings as to the basis and reasons for awarding the fees. The purpose of requiring the district court to make specific findings of fact and conclusions of law is to afford the appellate court a clear understanding of the district court's decision, so that it may be determined whether the district court applied the proper law to the appropriate facts in reaching its conclusion. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 225, 646 P.2d 988, 996 (1982). The absence of adequate findings and conclusions of law will require a reversal of the judgment and remand for additional findings and conclusions. *Id.*

*Id.* at 265.

In this case, the district court explained at the hearing on Clark's request for attorney fees and costs that it was "articulat[ing] its reasons [for granting Clark's motion] here on the record" and it proceeded to do so. Tr., p. 80, L. 8-10. The court reporter present at the hearing provided

a written transcript of the district court's decision and those written findings are contained in pages 65-87 of the Transcript on Appeal. As explained in *Snipes v. Schalo*, the purpose of requiring written findings is so the court's "specific findings of fact and conclusions of law" are on the record "to afford the appellate court a clear understanding of the district court's decision, so that it may be determined whether the district court applied the proper law to the appropriate facts in reaching its conclusion." *Id.* at 265.

In this case, the district court's specific findings in the written transcript by which the court found "that under 12-121 that this case was brought frivolously" (Tr., p. 81, L. 1-2) include:

- "Thornton's decision not to produce a copy of the very deed that this case turns around [which is] part of the reason why attorney's fees continued to accrue throughout the rest of the spring of 2014 up until the present date." Tr., p. 81, L. 16-22.

- "The arguments [are] frivolous...and nothing about arguing them time after time after time...changes that fact. This is a written easement. It is recorded. It is appurtenant." Tr., p. 82, L. 5-9.

- "The fact that Thornton would even bring this case in light of an express recorded easement that wasn't vague, that gave Clark the right to cross this property it is – as Mr. Hazel quoting Seinfeld, it's outrageous, it's egregious, it is preposterous. It's just absurd." Tr., p. 83, L. 8-13.

- "You can't put a gate up when you don't have the right to keep that other person out, and – and that wrong has always been present ever since this case was filed, and Thornton, I am convinced, had he ever read his deed, knew that." Tr., p. 84, L. 6-10.

The district court also stated during the hearing that it agreed "with everything that has been submitted by Mr. Hazel in his brief," and thereby effectively adopted and incorporated into the record the writing and all legal and factual positions of Mr. Hazel as part of its ruling. Tr., p. 81, L. 6-7.

The district court additionally made known its position that Thornton had brought his case frivolously in its written decision granting Clark's motion for summary judgment. It gave its reasons as follows:

> Thornton's failure to read and comprehend what is of record (or if he read his deed at the time, his refusal to abide by the language in his deed), the written easement, is troubling to the Court. Nearly a year ago, Thornton's in July 2013 of excluding Clark from using her easement, was simply wrong. Thornton had no legal right to do so. But *today*, Thornton has obviously read his deed. Thornton can no longer claim ignorance. And for Thornton to *today* claim that "John Thornton has a right to question those who claim to have the right to cross his property, and it is not unreasonable to ask for identification and verification of such claim..."...is absolutely incredible. Even more recently, after Thornton's affidavit and brief were filed, Thornton's attorney, at the March 14, 2014, hearing argued: "Thornton was never on any notice there was a right to use." **Such argument completely ignores the purpose of Idaho's recording statutes. I.C. § 55-811. How Thornton's attorney can make such a statement to the Court, is not capable of being understood. The fact that Thornton refused to submit proof of the fact of the recorded easement in the earlier motion for summary judgment brought by Pandrea, only illustrates the untenable position Thornton took not only on July 20, 2013, but throughout this litigation, and Thornton, and his attorney, obviously continue to adhere to up to the present time. Thornton cannot make the written easement go away by pretending it does not exist. Thornton's attorney cannot pretend Idaho's recording statutes do not exist. At the March 14, 2014, hearing, Thornton's attorney in concluding her oral argument, that Thornton's actions on July 20, 2013, and opposition to Clark's claims in this lawsuit "...were not frivolous." The Court disagrees.**

R. Vol. II, pp. 284-285. (Emphasis added).

*b) Clark prevailed on all issues.*

Thornton alleges that Clark "dismissed and did not prevail on the issue of damages" and that Clark "did not prevail on the issue of quiet title to the Well Piece" and he argues that she is, therefore, not the prevailing party and that it is inappropriate to award attorney's fees in this case under I.C. § 12-121. Appellant's Brief p. 31. In the underlying case, Clark was the prevailing party on all issues. Although Thornton claims Clark did not prevail on these two issues, neither of those issues are "legitimate, triable" issues.

In the case of *McGrew v. McGrew*, 139 Idaho 551, 82 P. 3d 833, (2003), this Court explained the general rule as to the allowance of an attorney fee award under I.C. § 12-121:

> **[I]f there is a legitimate, triable issue of fact**, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation.

*Id.* at 844. (Emphasis added).

The "issue of quiet title of the Well Piece" was not a "triable" issue as it concerned Clark. In its decision granting summary judgment, the district court found that "there is no controversy between Thornton and Clark regarding an interest in the Well Piece" and that therefore that issue was moot. R. Vol. II, p. 287. The case of *Freeman v. Idaho Dep't of Correction*, 138 Idaho 872, 875, 71 P.3d 471, 475 (Ct. App. 2003) confirms this is not a triable issue. The Idaho Court of Appeals explained therein that "[t]he general rule of mootness doctrine is that, to be justiciable, an issue must present a real and substantial controversy that is capable of being concluded through a judicial decree of specific relief." *Id.* Because this "Well Piece" issue was moot, it cannot be considered in determining whether Clark was the prevailing party.

In regards to *Clark's claim* for damages *against Thornton*, it is true that Clark voluntarily dismissed this claim "in an effort to avoid further wasteful litigation costs." R., Vol. II, p. 297, Vol. III, p. 487. However, she prevailed in establishing that she had an easement, and that Thornton's actions were unlawful because of this. Because she did so, this issue also did not present a "triable issue of fact" that Thornton had to defend against. Following summary judgment, Clark voluntarily dismissed this claim and a trial was never held. Thus, Clark was the prevailing party in all respects.

2. The district court found that Thornton and the Intervenor violated I.R.C.P. 11(a)(1) and thereby properly imposed sanctions on both of them.

An award of sanctions under Idaho Rule of Civil Procedure 11(a)(1) is reviewed on appeal under an abuse-of-discretion standard. *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94 (1991). I.R.P.C. 11(a)(1) provides in pertinent part as follows:

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief *after reasonable inquiry* it is well grounded in fact and is warranted by existing law or a good faith argument for the

> extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation...*If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative,* ***shall*** *impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

*Id.* (Emphasis added).

During oral argument on Clark's motion for attorney's fees and costs, Clark's attorney informed the district court that "never in my twenty-year career [have I] asked for an award of attorney's fees against another lawyer, but in this case it's warranted." Tr., p. 73, L. 7-9.

Thornton's frivolous actions throughout this case began with the filing of his Complaint, which Val Thornton typed up so as to purposefully remove and omit from the legal description the language of the reserved easement. As argued above, the frivolity of their arguments snowballed from there. However, the district court based its decision to award Rule 11 Sanctions not only on the baselessness of Thornton's and the Intervenor's arguments at the outset, but instead it based the award on their continued adherence to demonstrably false facts, the Intervenor's misleading presentment of her client's claim, lack of candidness towards the tribunal, and dogged adherence to outrageous legal arguments. The district court agreed that this case was one where Rule 11 sanctions were appropriate and explained its reasons:

> [W]hat is truly amazing in this case is that had Ms. Thornton on behalf of her client, Mr. Thornton, produced a copy of the deed at the summary judgment phase involving Ms. Pandrea, this case would've been over at that time. **Ms. Thornton's decision not to produce a copy of the very deed that this case turns around is – is part of the basis for this Court's awarding Rule 11 sanctions**, but it's also part of the reason why attorney's fees continued to accrue throughout the rest of the spring of 2014 up until the present date. **I think had Ms. Thornton been candid on behalf of her client and candid to the Court, I think it's quite possible that Ms. Thornton could've avoided the imposition of sanctions under Rule 11**, and certainly her and her client could've avoided the quite high attorney's fees that are being assessed against both of them jointly and severally: Mr. Thornton under 12-121 and Ms. Thornton and Mr. Thornton under Rule 11.

> **The arguments...are frivolous**. There – and nothing about arguing them time after time after time again, Ms. Thornton, changes that fact. This is a written easement. It is recorded. It is appurtenant.

Tr., p. 81, L. 12-25, p. 82, L. 1-9

The district court addressed the obvious fact that Thornton's attorney, the Intervenor, had not made a reasonable inquiry of the facts. It stated:

> You can't put a gate up when you don't have the right to keep that other person out, and – and that wrong had always been present ever since this case was filed, and Thornton, I am convinced, had he ever read his deed, knew that, and **Ms. Thornton had a duty to research that deed and know the contents of that deed and know the legal significance of that deed**.

Tr., p. 84, L. 7-13. (Emphasis added).

The district court found "that under 12-121 that this case was brought frivolously, and under Rule 11 [found] that both Ms. Thornton and her husband, her client, filed pleadings that aren't well-grounded in fact [or] a reasonable extension of the law." Tr., p. 81, L. 1-5. Because the district court found that Thornton and the Intervenor signed documents in violation of Rule 11, the rule provides that it "shall" impose an appropriate sanction and it exercised its discretion and reasonably reached its decision by applying the appropriate legal standards to the facts of the case

3. The district court properly considered the factors under I.R.C.P. 54(e)(3) in awarding attorney fees.

Throughout this case up to the present time, the district court has made only one award of attorney fees. That award was in the amount of $41,530.17 and is the amount contained in the *Amended Judgment* of June 30, 2014 (R. Vol. III, pp. 579-583) and in the *Second Amended Judgment* entered February 25, 2015[13].

Clark filed her Motion for Award of Attorney's Fees and Costs on May 12, 2014 in which she requested $41,530.17 in fees and costs (R. Vol. III, pp. 473-484). She also filed the

[13] *See* Document 9 to *Respondents' Motion to Augment* filed with this Court on December 28, 2015 ("*Respondents' Motion to Augment*") – ***Second Amended Final Judgment*** entered February 25, 2015.

*Affidavit/Memorandum of Joel P. Hazel in Support of Motion for Award of Attorneys' Fees and Costs* in which she laid out the relevant factors of I.R.C.P. 54(e)(3). R. Vol. III, pp. 485-495. On June 24, 2014, Clark filed the *Supplemental Affidavit of Jason M. Gray in Support of Motion for Award of Attorney's Fees and Costs*, in which she requested an additional $4,539.93 for fees accrued after May 12, 2014. Thornton filed an objection and a motion to disallow Clark's attorney fees and costs on May 27, 2014. At the hearing on Clark's motion, the court began by explaining that it had read all of the parties' documents filed in support of and in opposition to Clark's motion, and listed the documents one-by-one. Tr., p. 66, L. 11-25, p. 67, L. 1-5.

During oral argument, Clark addressed the amount of the attorney's fees requested, stating:

> Getting to the amounts of the attorney's fees, I'll admit they're more than they should be in this case, and they're more than they should be because of the Thorntons' approach to this litigation and Pandrea's approach to this litigation.
>
> An argument might be made that Thorntons shouldn't be responsible for the amount of work that we had to donate to or devote to dealing with Pandrea's pleadings in this case. However, Pandrea and Thornton, the evidence is pretty clear that they were working in tandem. Val Thornton would cite to affidavits filed by Pandrea. Pandrea would cite to arguments made by Thornton. They are neighbors. They live close to each other. It seems clear that despite Clark and Pandrea having exactly-aligned legal positions, that Thornton and Pandrea elected to get together in a cynical attempt to drive up the costs and attempt to harass Kari Clark into just conceding because it's just too dang expensive, and she did not.
>
> She had the wherewithal to see this through, and this court should make it right by awarding every penny of our fees set forth in the affidavits of me and Jason Gray, together with $66 in court costs. The total of that amount of both affidavits is $46,070.64. Again, I'd like this court to send a message to Ms. Thornton and her husband that they do not get to litigate for free just because you have a law license.

Tr., p. 73, L. 10-25, p. 74, L. 1-11.

At that hearing, district court stated, "I am granting the motion for attorney's fees and costs in the amount requested by Mr. Hazel *in his original affidavit*, both as to fees and costs, and I think the – the issue as to the supplemental affidavit of Jason Gray is premature at this

time." Tr., p. 80, L. 10-15. (Emphasis added). The court also stated that "as to that additional $4,539.93 in fees, not costs, but fees the plaintiff is entitled fourteen days to object, and then if they do object, the matter can be noted up for hearing." Tr., p. 80, L. 15-18. No hearing was ever set regarding the additional $4,539.93, and the district court never awarded those additional fees to Clark.

The district court explained its reasons for awarding the attorney fees and costs requested by Clark. It stated that it "agree[s] with everything that has been submitted by Mr. Hazel in his brief. I will try to keep my comments to a minimum, but in addition to those arguments made in...Clark's response that was dated June 19th, I agree with everything that is set forth in that document." Tr., p. 81, L. 6-11. The district court made written findings in support of its decision to award fees by adopting and incorporating as part of its reasoned argument a portion of the written record of the court, namely, Clark's response dated June 19, as well as everything set forth therein. *Id.*

In the case of *Pinnacle Engineers v. Heron Brook, LLC*, 139 Idaho 756, 86 P. 3d 470 (2004), this Court explained that while the court must consider the relevant factors of I.R.C.P. 54(e)(3) in awarding attorney fees, it is not necessary that the court reference the rule or the factors as long as the court did consider those factors, which can be shown in various ways. It explained:

> **We have previously upheld awards of attorney fees where the record indicates that the trial court considered the relevant factors even though it did not make any reference to the rule when making the award.** In *Brinkman v. Aid Insurance Co.,* 115 Idaho 346, 766 P.2d 1227 (1988) [Overruled on other grounds, *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589 (2005)], the trial court awarded attorney fees in an amount roughly equal to the contingent fee the prevailing party had contracted to pay his attorneys. When making that award, the trial court mentioned only that the attorney fee was contingent and did not make any reference to Rule 54(e)(3) or to the other factors listed in that rule. **We upheld the award, however, "because the record establishes that several of the eleven factors were argued and briefed to the court and there is no basis to conclude the court failed to consider each of the factors."** 115 Idaho at 351, 766 P.2d at 1232. We further added, "**Here, the**

**profile of the record provides enough information to presume that the trial judge considered the other pertinent factors enumerated in the [rule].**" *Id.*

*Id.* at 474. (Emphasis added).

While in this case the district court did not specifically discuss the requirements of I.R.C.P. 54(e)(3), it confirmed that it had read all the briefs submitted by the parties, and that Clark's brief addressed all those requirements (R. Vol. III, pp. 476-483). The district court incorporated the Rule 54(e)(3) elements and analysis when it specifically noted that it "agreed with everything [Clark] submitted in [her] brief" (Tr., p. 81, L. 10-11). The district court also explained at length the reasons behind its award as is required by I.R.C.P. 54(e)(3). The Court's award of sanctions under Rule 11(a)(1) is also an independent but legally sufficient basis for upholding the award as well.

4. Contrary to Thornton's assertion, no fees were awarded by the district court for Thornton's frivolous filing of a motion for stay and for waiver of the supersedeas bond.

As explained in the previous section, the only award of attorney fees in this case was the $41,530.17 contained in the *Amended Judgment* entered on June 30, 2014 (and also contained in the *Second Amended Judgment* entered on February 25, 2015).

Thornton claims that "the district court awarded Clark's post-judgment *attorney fees* as a Rule 11 sanction against Thornton for filing his motion for stay and a for waiver of the supersedeas bond requirement." Appellant's Brief, p. 37. (Emphasis added). It is true that Thornton brought his motion for stay and for waiver of the supersedeas bond requirement, which motion was not well grounded in fact or warranted by existing law[14]. It is also true that the Barretts (who by that time had been substituted in the place of Clark) had to defend against Thornton's frivolous motion, and that the Barretts requested sanctions[15]. It is also true that the district court granted the Barretts' request for sanctions under Rule 11(a)(1) because the court

[14] *See* Document 4 to *Respondents' Motion to Augment* – ***Motion for Stay Pending Appeal and Waiver of Supersedeas*** filed September 24, 2014.
[15] *See* Document 6 to *Respondents' Motion to Augment* – ***Opposition to Plaintiff's Motion for Stay Pending Appeal and Waiver of Supersedeas Bond*** filed October 15, 2014.

found that Thornton's motion was "not well grounded in fact nor is it warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[16] However, it is not true that an Order was ever entered wherein *actual attorney fees* were awarded to the Barretts in this matter. This is because the Respondents never sought the fee award.

Thornton argues that this "Court should hold that it was an abuse of discretion to award Rule 11 sanctions against Thornton for pleading for a stay and for a waiver of the supersedeas bond requirements." Appellant's Brief, p. 39. Respondents Barrett disagree. Although no actual fees were awarded, such an award was warranted due to the Barretts having to defend against Thornton's frivolous motion.

The Barretts had argued in their opposition to Thornton's motion[17] that the rule under which Thornton brought his motion – I.A.R. 13(b)(14) – did not apply to a stay of a money judgment. Thornton specifically requested in his motion that the district court (1) prevent collection efforts on the money judgment, and (2) waive the supersedeas bond or other security that the plaintiff would otherwise be required to post under I.A.R. 13(b)(15)[18]. The Barretts argued and the district court agreed that because the Rule is clear, it is frivolous to ask for a stay on collection efforts pending appeal of a money judgment without posting a bond. In their opposition, the Barretts explained that:

> [Clark] spent well over $40,000.00 defending against plaintiff's frivolous lawsuit, obtaining a Judgment against plaintiff and his attorney in the amount of $41,530.17, and is now attempting to collect on that Judgment. To thwart defendant's effort, plaintiff, who is essentially able to litigate cost-free due to his wife's representation of him, continues to file frivolous documents with the Court in contravention of Rule 11. His (and her) frivolous motions should be denied,

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[16] *See* Document 4 to *Appellant's Motion to Augment* –***Order Denying Plaintiff's Motion for Stay Pending Appeal and Waiver of Supersedeas Bond*** entered November 13, 2014, p. 2.
[17] *See* Document 6 to *Respondents' Motion to Augment* – ***Opposition to Plaintiff's Motion for Stay Pending Appeal and Waiver of Supersedeas Bond*** filed October 15, 2014, pp. 2, 3, 6-7.
[18] *See* Document 4 to *Respondents' Motion to Augment* – ***Motion for Stay Pending Appeal and Waiver of Supersedeas*** filed September 24, 2014, p. 1.

and both should be sanctioned for the expenses defendants have incurred in responding to the motions[19].

While the district court agreed with the Barretts' arguments and granted their request for fees[20], it did not award actual fees because after the Barretts filed their memorandum of costs[21], Thornton filed an objection and thereafter the district court never held a hearing and never made an actual award of fees. A review of the Register of Actions of this case reveals that after Thornton filed his objection, no hearing was held regarding Barretts' request and that no order awarding fees was entered. R., Supplemental Clerk's Records, pp. 23-28.

5. In Thornton's argument related to Clark's attorney fees request, he again attempts to mislead this Court with false and harassing statements with no support in reality on the record.

Thornton argues that:

> In this case, opposing counsel did not limit his request for attorney fees to time expended defending against Thornton's quiet title to the easement. *R. Vol. III, p. 485-495.* Thornton was billed for time expended on Boyd-Davis' and her husband's criminal conduct resulting in his criminal conviction. *R. Vol. III, p. 495, Ll. 1-4.*

Thornton places a footnote to indicate that "Boyd-Davis'...husband's criminal conviction" was in Bonner County Case Nos. CR-2014-2981 and CR-2014-2984. Appellant's Brief, p. 33[22].

Respondents Barretts assert that this is yet another example of Thornton's malicious and vexatious pattern of harassment. The statement that Boyd-Davis' husband was convicted of a crime is false, Thornton knows it is false, and the Idaho Court Repository demonstrates it is false. Thornton places this false statement against a person who is not even a party to this case

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[19] *See* Document 6 to *Respondents' Motion to Augment* – ***Opposition to Plaintiff's Motion for Stay Pending Appeal and Waiver of Supersedeas Bond*** filed October 15, 2014,, p. 7.
[20] *See* Document 4 to *Appellant's Motion to Augment* –***Order Denying Plaintiff's Motion for Stay Pending Appeal and Waiver of Supersedeas Bond*** entered November 13, 2014.
[21] *See* Document 8 to *Respondents' Motion to Augment* – ***Defendants/Counterclaimants' Memorandum of Costs and Attorney Fees*** filed November 26, 2014.
[22] Intervenor repeats the same false statement in the Intervenor's Brief at p. 3.

for no other reason than to harass the Barretts and these non-parties. Boyd-Davis[23] was a witness to the incident wherein Thornton and the Intervenor blocked Clark's access to the gate, and she submitted an affidavit in support of Clark's motion for summary judgment. R. Vol. I, pp. 144-162. Thornton and the Intervenor now seek to disparage Boyd-Davis and her husband.

### E. The district court properly substituted the Barretts in the stead of Clark.

Thornton claims that the district court erroneously substituted "Keith L. [*sic*] and Deanna Barrett"[24] in the stead of Clark. Thornton argues that "Clark is not alleged to be incompetent, there had been no appointment of guardian or conservator, and the facts do not support a motion to substitute parties." Appellant's Brief, p. 36. He additionally asserts that:

> Barretts do not stand in the shoes of Kari Clark as to Thornton's damages in the event the matter is remanded to the district court. Barretts have not assumed liability in the event Thornton prevails in his appeal and is found to be entitled to damages and/or attorney fees for Clark's litigation in the underlying action.

*Id.*

Although Thornton correctly states the applicable rule, I.R.C.P. 25(c), he misinterprets the rule and misapplies it to the facts.

On July 23, 2014, Clark brought a motion in the district court to substitute parties. R. Vol. III, p. 466. On July 28, 2014, filed a *Notice of Substitution of Kenneth J. Barrett and Deanna L. Barrett in the Stead of Respondent Kari A. Clark* with this Court pursuant to Idaho Appellate Rule 7. R. Vol. III, pp. 601-604. Clark provided evidence to the Court that she had "transferred title to her real property that is the subject of the instant appeal and the underlying District Court action to [the Barretts]" and that she had "assigned to the Barretts all her legal and equitable right, title and interest to pursue and/or defend claims in [these matters.]" *Id.*, p. 601. The district court entered an order wherein it granted Clark's motion on August 4, 2014, which

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[23] Terri Boyd-Davis is the sister of Respondent Deanna Barrett and the niece of Clark and Pandrea.

[24] Respondents are **Kenneth J.** and Deanna **L.** Barrett – not Keith L. and Deanna Barrett as Appellant wrongly states.

order provided that the Barretts "as assignees of KARI A. CLARK'S interests to pursue and/or defend claims...are hereby substituted *for all purposes* in the stead of [Clark]." *Id.*, pp. 614-615. (Emphasis added). This Court entered its *Order Approving Substitution* on August 22, 2014. R. Vol. III, pp. 624-625.

I.R.C.P. 25(c) provides:

> In case of any transfer of interest, the action *may* be continued by or against the original party, *unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action* or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

Id. (Emphasis added).

It is not necessary that Clark be "incompetent," as Thornton infers, in order to support a substitution of parties. In this case, Clark transferred her interest in her real property to the Barretts and additionally assigned her claims in this action to them. Additionally, Clark was not and will not be found liable to Thornton for any damages. Thus, the district court had discretion to allow the substitution, and it properly did so.

### F. The Appellant's and Intervenor's request for attorney fees and sanctions against Respondents on appeal should be denied.

Thornton argues he is entitled to an award of attorney fees on appeal under I.C. §12-121, claiming that it was somehow frivolous for Respondents Barretts to defend against the appeal. Appellant's Brief, p. 39. Thornton and the Intervenor also request that this Court sanctions Respondents for I.A.R. 11.2 violations, falsely claiming that the Barretts have deceived the Court. Appellant's Brief, pp. 39-41, Intervenor's Brief, pp. 6-8. As already explained in this brief, Thornton's accusations are baseless. The only parties guilty of attempting to mislead the Court are Val Thornton and John Thornton. Neither attorney fees under I.C.§ 12-121 nor sanctions under I.A.R. 11.2 are warranted, and this Court should thereby deny Thornton's and the Intervenor's request.

## G. The Respondents are entitled to attorneys' fees and costs on appeal.

Pursuant to Idaho Code § 12-121 and Idaho Appellate Rules 11.2(a), 40, and 41, Respondents Barretts are entitled to an award of their costs and attorneys' fees on appeal.

In this case, Thornton and the Intervenor acted without a reasonable basis in fact or law when they filed their Complaint and asserted that Clark had no easement across Thornton's property. Three separate deeds that are a matter of public record reserved an easement across Thornton's property. Thornton and the Intervenor additionally acted without a reasonable basis in fact or law when they blocked Clark's easement access.

As argued throughout this brief, Thornton and his wife/attorney, the Intervenor herein brought a frivolous case against Clark that was not well grounded in fact or warranted by law. Thornton and the Intervenor attempted to mislead the district by not producing a copy of the Thornton Deed and removing the specific easement language from what Thornton represented to the district court was the legal description of his property. On appeal, they have again attempted to mislead this Court by doctoring the record on appeal. Both the Appellant's Brief and the Intervenor's Brief are frivolous, misleading, and contain what are undeniably false statements of fact.

An award of attorney fees under I.C. § 12-121 to the prevailing party is proper when the action was either brought or defended frivolously, unreasonably or without foundation. *Kelly v. Silverwood Estates*, 127 Idaho 624, 903 P.2d 1321 (1995).

> Additionally, an award of sanctions is appropriate under I.A.R. 11.2(a), which provides: Every notice of appeal, petition, motion, brief and other document of a party represented by an attorney shall be signed by at least one (1) licensed attorney of record of the state of Idaho, in the attorney's individual name, whose address shall be stated before the same may be filed. A party who is not represented by an attorney shall sign the notice of appeal, petition, motion, brief or other document and state the party's address. The signature of an attorney or party constitutes a certificate that the attorney or party has read the notice of appeal, petition, motion, brief or other document; that to the best of the signer's knowledge information, and belief **after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or**

> **needless increase in the cost of litigation**. If the notice of appeal, petition, motion, brief, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, ***shall*** impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the notice of appeal, petition, motion, brief or other document including a reasonable attorney's fee.

*Id.* (Emphasis added).

"[W]hether sanctions are appropriate turns on whether this appeal is interposed for any 'improper purpose.'" *Painter v. Potlatch Corp.*, 138 Idaho 309, 63 P. 3d 435, 441 (2003). In this case, Thornton and the Intervenor are continuing this lawsuit on appeal for an improper purpose, just as they did in the underlying action. In the case of *Talbot v. Ames Const.*, 127 Idaho 648, 940 P.2d 560 (1995), this Court sanctioned an attorney for acting in bad faith in bringing an appeal, stating:

> Under I.A.R. 11.1 this Court shall impose sanctions upon an attorney who signs a notice of appeal, petition, motion, or brief that is not well grounded in fact, warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, or is interposed for any improper purpose. I.A.R. 11.1.
>
> ***
>
> We agree...that the attorney...acted in bad faith in bringing this appeal. There was no good-faith argument by this attorney for an extension or modification of existing law. There was no basis in fact for this appeal...There were no legal arguments presented to this Court as a basis for an appeal of this case. [The attorney] had no basis for this appeal, wasted judicial resources, and acted in bad faith in pursuit of this appeal. We conclude that the imposition of personal sanctions against [the attorney] pursuant to I.A.R. 11.1 are warranted.

*Id.* at 565.

Thornton and the Intervenor have acted in bad faith in bringing this appeal and have continued to waste judicial resources. For the reasons explained above, Respondents Barretts respectfully request that this Court impose sanctions on Thornton and the Intervenor, and award the Barretts their attorney fees and costs on appeal.

## IV. CONCLUSION

For all of the reasons stated above, Respondents Barretts respectfully request that this Court confirm the decision of the district court in this matter in all respects. Respondents Barretts additionally request that this Court award them their attorney fees and costs in defending against this appeal.

RESPECTFULLY SUBMITTED this 19 day of January 2016.

Michael G. Schmidt

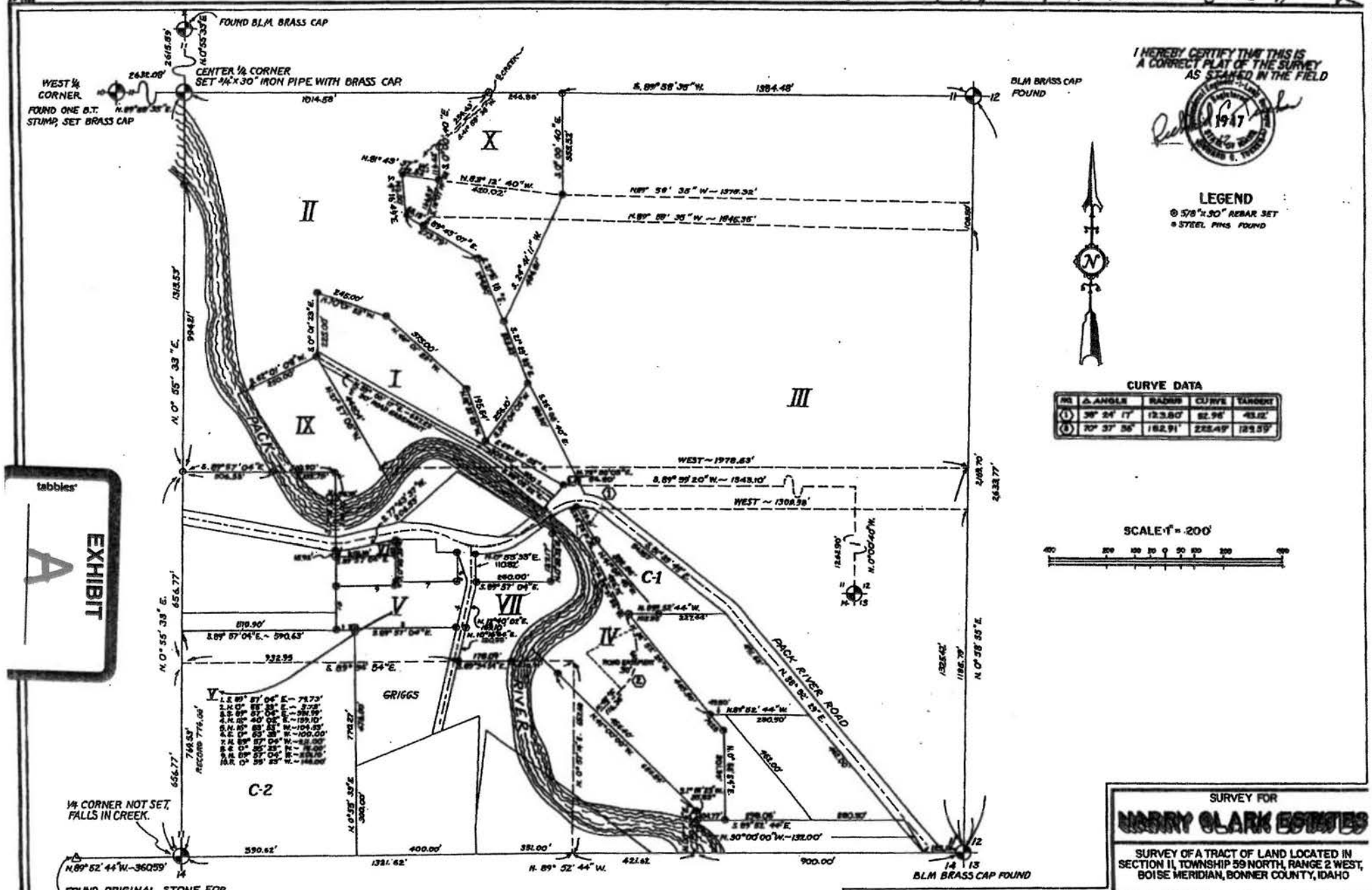
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of January 2016 I caused to be served two true and correct copy of the foregoing document on the parties listed below in the manner indicated.

| | |
|---|---|
| Val Thornton<br>4685 Upper Pack River Road<br>Sandpoint, ID 83864 | [X] U.S. Mail, Postage Prepaid<br>[ ] Hand Delivered<br>[ ] Overnight Mail<br>[ ] Facsimile: 208-255-2327 |
| Mary Pandrea<br>4687 Upper Pack River Road<br>Sandpoint, ID 83864 | [X] U.S. Mail, Postage Prepaid<br>[ ] Hand Delivered<br>[ ] Overnight Mail<br>[ ] Facsimile: |

Michael G. Schmidt

223082 LWR 54 N R 2 W SEC 11 R




| NO. | Δ ANGLE | RADIUS | CURVE | TANGENT |
|---|---|---|---|---|
| ① | 38° 24' 17" | 123.80' | 82.96' | 43.12' |
| ② | 70° 37' 36" | 182.91' | 225.49' | 129.59' |

EXHIBIT A

tabbies

SURVEY FOR HARRY CLARK ESTATES

SURVEY OF A TRACT OF LAND LOCATED IN SECTION 11, TOWNSHIP 59 NORTH, RANGE 2 WEST, BOISE MERIDIAN, BONNER COUNTY, IDAHO

TUCKER ENGINEERING CONSULTANTS
109 S. 1st AVENUE
SANDPOINT, IDAHO.

| CHECKED | REVISION | DATE | BY: | DRAWN BY: D.J. | DATE: 7-3-79 | PROJ. 75-35 |
|---|---|---|---|---|---|---|
| | | | | CHECKED: P.J.B. | SCALE: 1" = 200' | DRAWG. NO. 1 of 2 |

tabbies

EXHIBIT B

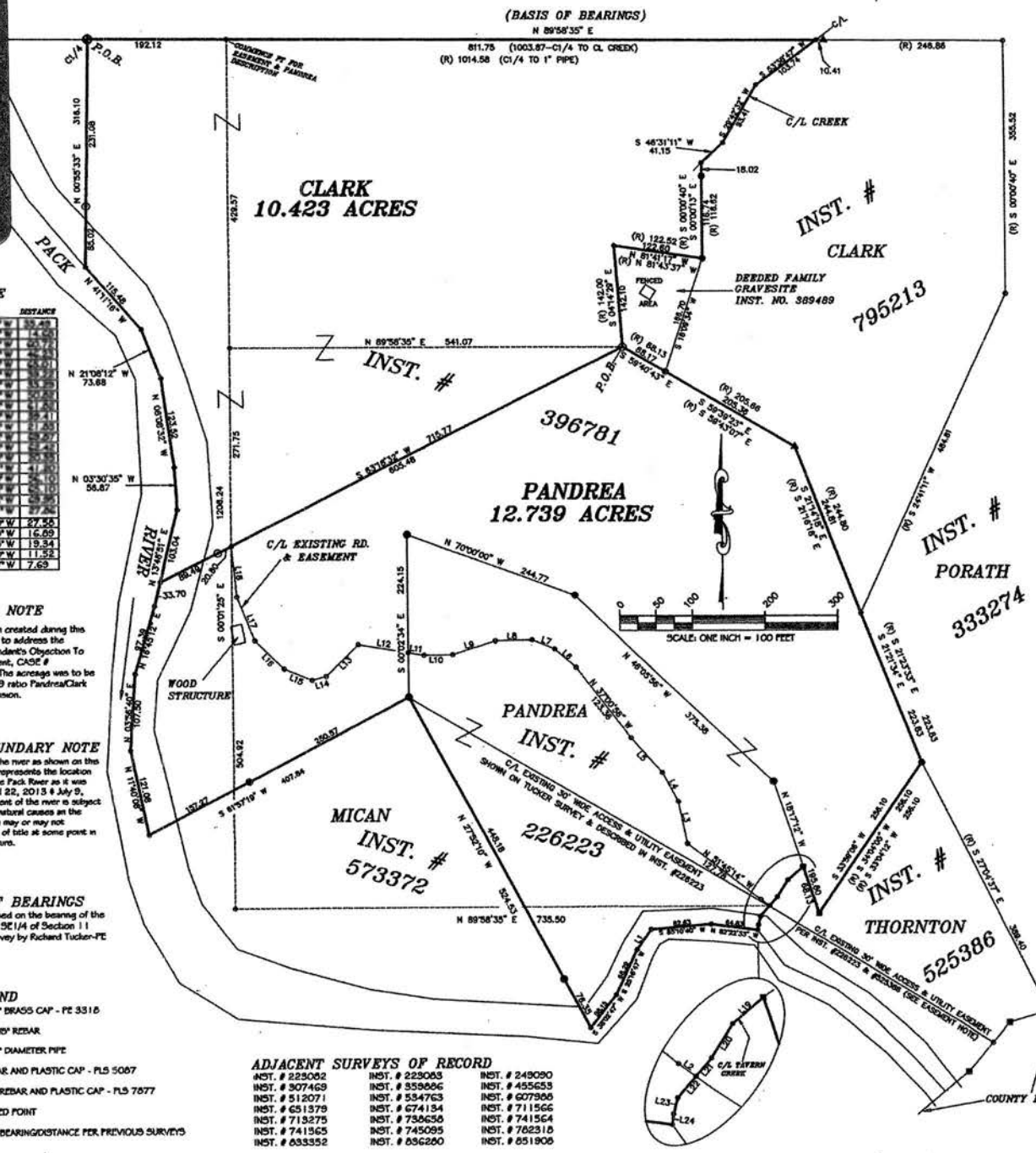
# RECORD OF SURVEY

IN THE

## SE1/4 OF SECTION 11
## TOWNSHIP 59 NORTH, RANGE 2 WEST, B.M.
## BONNER COUNTY, IDAHO

FOR

## KARI CLARK




### LINE TABLE

| LINE | BEARING | DISTANCE |
|---|---|---|
| L1 | S 34°42'52" W | 39.49 |
| L2 | S 11°55'47" W | 14.06 |
| L3 | S 37°30'56" W | 20.00 |
| L4 | S 52°29'04" E | 20.00 |
| L5 | S 37°30'56" W | 20.00 |
| L6 | N 52°29'04" W | 20.00 |
| L7 | S 37°30'56" W | 20.00 |
| L8 | N 52°29'04" W | 20.00 |
| L9 | S 37°30'56" W | 20.00 |
| L10 | N 52°29'04" W | 20.00 |
| L11 | S 37°30'56" W | 20.00 |
| L12 | N 52°29'04" W | 20.00 |
| L13 | S 37°30'56" W | 20.00 |
| L14 | N 52°29'04" W | 20.00 |
| L15 | S 37°30'56" W | 20.00 |
| L16 | N 52°29'04" W | 20.00 |
| L17 | S 37°30'56" W | 20.00 |
| L18 | N 52°29'04" W | 20.00 |
| L19 | S 37°30'56" W | 20.00 |
| L20 | S 32°12'50" W | 27.56 |
| L21 | S 40°45'08" W | 16.69 |
| L22 | S 40°49'08" W | 19.34 |
| L23 | S 14°53'30" W | 11.52 |
| L24 | S 07°37'27" W | 7.69 |

### BOUNDARY NOTE

The line of division created during this survey was meant to address the Decision On Defendant's Objection To Proposed Judgement, CASE # CV-2011-535. The acreage was to be divided by an 11/9 ratio Pandrea/Clark per the court decision.

### RIVER BOUNDARY NOTE

The alignment of the river as shown on this Record of Survey represents the location of the thread of the Pack River as it was found to exist April 22, 2013 & July 9, 2013. The alignment of the river is subject to change due to natural causes on the boundary as shown may or may not represent the limit of title at some point in the past or the future.

### BASIS OF BEARINGS

Bearings are based on the bearing of the north line of the SE1/4 of Section 11 per a 1979 survey by Richard Tucker-PE 1947

### LEGEND

- FOUND 2" BRASS CAP - PE 3318
- FOUND 5/8" REBAR
- FOUND 1" DIAMETER PIPE
- 5/8" REBAR AND PLASTIC CAP - PLS 5087
- SET 5/8" REBAR AND PLASTIC CAP - PLS 7877
- COMPUTED POINT
- (R) RECORD BEARING/DISTANCE PER PREVIOUS SURVEYS

### ADJACENT SURVEYS OF RECORD

| | | |
|---|---|---|
| INST. # 225062 | INST. # 223063 | INST. # 249090 |
| INST. # 307469 | INST. # 359666 | INST. # 455653 |
| INST. # 512071 | INST. # 534763 | INST. # 607966 |
| INST. # 651379 | INST. # 674134 | INST. # 711566 |
| INST. # 713275 | INST. # 738658 | INST. # 741564 |
| INST. # 741565 | INST. # 745095 | INST. # 762318 |
| INST. # 833352 | INST. # 836280 | INST. # 851908 |

### PROPERTY DESCRIPTION – CLARK 10.423 ACRES

A tract of land situated in the Southeast Quarter (SE1/4) of Section Eleven (11), Township Fifty-nine (59) North, Range Two (2) West of the Boise Meridian, Bonner County, Idaho; being a portion of that parcel described in Instrument No. 396781; more particularly described as follows:

Beginning at the northwest corner of said SE1/4, which is marked on the ground by a 2" brass cap stamped PE 3318; thence, along the north line of the SE1/4, N 89°58'35" E, 1003.87 feet to the centerline of a creek; thence, leaving said north line and along said centerline the following Three (3) courses: S 53°38'47" W, 108.74 feet; thence S 29°42'32" W, 93.41 feet; thence S 46°31'11" W, 41.15 feet; thence, leaving said centerline S 00°00'13" E, 18.02 feet to a 5/8" rebar; thence, continuing S 00°00'13" E, 116.74 feet to a 5/8" rebar, which marks on the ground the northeast corner of that parcel described in Instrument No. 389489; thence, along the boundary of that parcel described in Instrument No. 389489 the following Two (2) courses: N 81°41'17" W, 122.60 feet to the northwest corner thereof; thence S 04°14'29" E, 142.10 feet to the southwesterly corner of that parcel described in Instrument No. 389489; thence S 63°18'32" W, 715.77 feet to the thread of Pack River as it was found to exist April 22, 2013; thence, along the thread of the river the following Five (5) courses: N 13°48'51" E, 103.04 feet; thence N 03°30'35" W, 56.87 feet; thence N 08°08'32" W, 123.52 feet; thence N 21°08'12" W, 73.68 feet; thence N 41°11'16" W, 115.48 feet to the intersection with the west line of the SE1/4 of Section 11; thence, leaving said thread of the river and along said west line N 00°55'33" E, 85.02 feet to a 5/8" rebar and plastic cap stamped PLS 7877; thence, continuing along said west line N 00°55'33" E, 231.08 feet to the POINT OF BEGINNING, encompassing an area of 10.423 acres.

### PROPERTY DESCRIPTION – PANDREA 12.739 ACRES

A tract of land situated in the Southeast Quarter (SE1/4) of Section Eleven (11), Township Fifty-nine (59) North, Range Two (2) West of the Boise Meridian, Bonner County, Idaho, being a portion of that parcel described in Instrument No. 396781 and a portion of that parcel described in Instrument No. 226223; more particularly described as follows:

Commencing at a point on the north line said SE1/4 which is N 89°58'35" E, 192.12 feet from the northwest corner of the SE1/4; thence, leaving said north line in a perpendicular direction S 00°01'25" E, 429.57 feet; thence, parallel to the north line of the SE1/4, N 89°58'35" E, 541.07 feet to the southwesterly corner of that parcel described in Instrument No. 389489 and the TRUE POINT OF BEGINNING; thence, along the easterly line of that parcel described in Instrument No. 396781 the following Four (4) courses: S 59°40'43" E, 68.17 feet to a 5/8" rebar; thence S 59°39'23" E, 205.36 feet to a 1" diameter pipe; thence S 21°14'18" E, 244.81 feet; thence S 21°21'34" E, 223.83 feet to the most northerly corner of that parcel described in Instrument No. 525386, which is marked on the ground by a 5/8" rebar; thence, leaving said easterly line and along the northwesterly line of that parcel described in Instrument No. 525386, and shown on Amended Record of Survey, Instrument No. 851908, by PLS 5087, S 33°59'06" W, 256.10 feet to a 5/8" rebar and plastic cap stamped PLS 5087; thence N 18°17'12" W, 68.13 feet to a 5/8" rebar and plastic cap stamped PLS 5087; thence, along the centerline of Tavern Creek the following Four (4) courses: S 49°40'51" W, 27.86 feet; thence S 32°16'50" W, 27.58 feet; thence S 40°48'08" W, 36.23 feet; thence S 14°53'30" W, 11.52 feet; thence, perpendicular to the thread of the Pack River S 07°37'27" W, 7.69 feet to the thread of the Pack River as it was found to exist July 9, 2013; thence, along the thread of the river the following Five (5) courses: N 82°22'33" W, 64.83 feet; thence S 85°10'40" W, 82.63 feet; thence S 34°06'14" W, 35.49 feet; thence S 25°16'47" W, 68.29 feet; thence S 38°02'47" W, 58.15 feet; thence, leaving the thread of the river N 27°52'10" W, 524.53 feet to a corner of those parcels described in Instrument No.'s 226223, 573372, and 396781, which is marked on the ground by a 5/8" rebar; thence, along the line between those parcels described in Instrument No.'s 573372 and 396781, S 61°57'19" W, 407.84 feet to the thread of the Pack River as it was found to exist April 22, 2013; thence, along the thread of the river the following Four (4) courses: N 11°40'06" W, 121.08 feet; thence N 03°56'40" E, 107.50 feet; thence N 16°45'12" E, 97.39 feet; thence N 13°48'51" E, 33.70 feet; thence, leaving the thread of the river N 63°18'32" E, 715.77 feet to the POINT OF BEGINNING, encompassing an area of 12.739 acres.

### EASEMENT DESCRIPTION TO CLARK

An easement for ingress and egress in the Southeast Quarter (SE1/4) of Section Eleven (11), Township Fifty-nine (59) North, Range Two (2) West of the Boise Meridian, Bonner County, Idaho, being the width of the existing road, Ten (10) feet wide in most areas and Eighteen (18) feet wide at Tavern Creek, the centerline of which being more particularly described as follows:

Commencing at a point on the north line of said SE1/4 which is N 89°58'35" E, 192.12 feet from the northwest corner of the SE1/4; thence, leaving said north line in a perpendicular direction S 00°01'25" E, 1206.24 feet; thence, parallel to the north line of the SE1/4, N 89°58'35 "E, 735.50 feet to the POINT OF BEGINNING; thence, along the centerline of the existing road the following Eighteen (18) courses: N 53°36'45" W, 14.68 feet; thence N 51°45'14" W, 127.78 feet; thence N 11°36'34" W, 60.72 feet; thence N 27°17'41" W, 46.23 feet; thence N 41°09'08" W, 65.01 feet; thence N 37°00'53" W, 123.36 feet; thence N 48°25'01" W, 39.22 feet; thence N 68°04'12" W, 33.29 feet; thence S 88°47'17" W, 50.82 feet; thence S 72°13'13" W, 61.82 feet; thence S 89°01'10" W, 39.41 feet; thence N 80°35'06" W, 91.70 feet; thence S 45°20'45" W, 62.42 feet; thence S 75°06'38" W, 20.35 feet; thence N 67°44'51" W, 41.20 feet; thence N 45°19'26" W, 56.10 feet; thence N 21°58'55" W, 65.10 feet; thence N 05°39'16" W, 69.95 feet to the terminus of this easement.

### SURVEYOR'S CERTIFICATION

I, John Daniel Marquette, Idaho Land Surveyor No. 7877, do hereby certify that the plat hereon is a true and correct representation of a survey made by me or under my direct supervision in conformance with the laws of the State of Idaho (Idaho Code 31-2709, 1973 and Idaho Code 55-1905 through 1908) and accepted methods and procedures of surveying.

PROFESSIONAL LAND SURVEYOR REGISTERED 7877 STATE OF IDAHO JOHN DANIEL MARQUETTE

### COUNTY RECORDER

This Record of Survey was filed for record in the office of the Recorder of Bonner County, Idaho, at the request of J.R.S. Surveying, Inc. this


J.R.S. SURVEYING, INC.
PO BOX 3099-6476 MAIN
BONNERS FERRY, ID. 83805
(208) 267-7555


| RECORD OF SURVEY | |
|---|---|
| FOR: KARI CLARK | REVISION NO. 6 |
| DWN BY: JDM | 04-28-2014 |
| SE1/4 SEC. 11, T59N, R2W, B.M. | SHEET 1 OF 1 |
| BONNER COUNTY, IDAHO | JOB NO. 13-13 |